THE EXTENSION OF EMPLOYMENT RIGHTS
TO EMPLOYEES WHO WORK UNLAWFULLY

by

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SUMMARY

South Africa has over the years and particularly since the enactment of our new Constitution, attracted an increasing number of foreigners. One of the main problems associated with the large number of illegal immigrants in this country is that they are placing strain on South Africa’s already scare resources such as housing and healthcare. A further problem is that these illegal immigrants are competing with South Africans for jobs which are already scarce, and thus aggravating the unemployment situation. Nevertheless, these illegal immigrants are being employed and by virtue of their circumstances are easily exploited and often the victims of cheap labour, corruption, eviction and assault. Given that these workers are illegal immigrants not in possession of the required work permits, their employment is prohibited by the Immigration Act 13 of 2002. They are thus illegal workers.

Another category of illegal workers are those, predominantly women, who are employed in an industry which offers easy income with no contractual obligations – the prostitution industry. Despite the prohibition of prostitution by the Sexual Offences Act 23 of 1957, the prostitution industry throughout South Africa continues to exist. These workers are also particularly vulnerable and easily exploited and abused by their employers.

Illegal immigrants and sex workers in South Africa have until recently been denied access to the protection of our labour legislation, by virtue of the illegality of their employment contracts. However two recent controversial decisions, that of the Labour Court in the Discovery Health case, and that of the Labour Appeal Court in the Kylie case, have changed this position.
CHAPTER 1
INTRODUCTION

The labour rights of workers in South Africa are governed by the provisions of the Labour Relations Act\(^1\) (hereinafter referred to as the “LRA”), which gives effect to the Constitutional right to fair labour practices.\(^2\) The LRA however applies only to those workers who are employees as per the statutory definition contained therein, and accordingly before labour disputes can be resolved it must first be established whether the applicant seeking relief is an employee or not.

It is relatively simple to determine whether a party to a labour dispute is an employee in cases whether the parties have concluded an employment contract. However the difficulty arises where no contract of employment exists, or where the contract is illegal.

The purpose of this research is to ascertain whether labour rights can be extended to illegal workers. Two categories of illegal workers will be looked at in particular, namely illegal immigrants and sex workers.

In Chapter 2 the concept of employment is considered and discussed with regards to the definitions of the parties in an employment relationship, both in terms of the common law tests as well as the current statutory definitions. The importance and relevance of the contract of employment will also be considered in light of relevant case law.

In Chapter 3 the scope and effect of the Constitutional right to fair labour practices will be discussed. Given that our Constitution provides that when interpreting rights contained in the Bill of Rights, international law must be considered, this chapter will also explore the relevant public international law obligations which must be complied with.

Chapter 4 will focus on the first category of illegal workers, namely illegal immigrants, in order to determine whether these illegal workers are afforded any protection by our labour

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\(^1\) 66 of 1995.
\(^2\) S 23, Constitution of the Republic of South Africa.
legislation. In answering this question the provisions and effect of the Immigration Act\textsuperscript{3} will be considered, as well as the recent Labour Court decision in *Discovery Health Limited v CCMA & others*\textsuperscript{4} will be analysed.

Chapter 5 will focus on the second category of illegal workers, namely sex workers. The employment relationship between these workers and their employers will be looked at, as well as the prohibition of prostitution as provided for in the Sexual Offences Act.\textsuperscript{5} The findings in the controversial case of *Kylie v CCMA and Others*\textsuperscript{6} will also be analysed, which include the findings of the CCMA, Labour Court and Labour Appeal Court in this matter.

Lastly in Chapter 6 the findings of this research will be summarized and the question of whether labour rights are extended to illegal workers, will be answered.

\textsuperscript{3} Immigration Act 13 of 2002.

\textsuperscript{4} (2008) 29 ILJ 1480 (LC).

\textsuperscript{5} 23 of 1957.

CHAPTER 2
THE CONCEPT OF EMPLOYMENT

2.1 INTRODUCTION

The provisions of the Labour Relations Act\(^7\) (hereinafter referred to as the “LRA”) and other labour statutes apply only to those workers who are employees as per the statutory definition thereof. The starting point in all labour disputes is therefore to determine whether or not an individual is an employee.

Whilst seemingly straightforward, the statutory definition has not simplified matters for the courts and has been debated in much of our case law. At the centre of most debates has been whether or not an independent contractor, whilst being specifically excluded from the first part of the definition, is nevertheless included by the second part thereof. In dealing with this issue the courts have identified three tests, which are discussed in this chapter below.

Our courts initially viewed the employment relationship as being purely contractual. The statutory definition of an employee does not specifically provide that a worker is an employee only once a contract of employment has been entered into, and this has also been cause for debate which will also be considered in this chapter.

2.2 THE DEFINITION OF AN EMPLOYEE

On a daily basis commissioners and judges faced with labour disputes are required to ascertain whether the applicant seeking relief in terms of our labour legislation, is an employee or not.\(^8\) If the applicant is not an employee, the Commission for Conciliation, Mediation and Arbitration, (hereinafter referred to as the “CCMA”) an accredited bargaining council or the Labour Court, will have no jurisdiction to hear the matter and it is thus crucial that the dividing line between employees and non-employees is clarified and understood.

\(^7\) 66 of 1995.

2.2.1 THE COMMON LAW TESTS

Our courts initially followed the approach of the English courts, which focused on the employer’s right of supervision and control over the employee. This “supervision and control test” meant that in establishing whether an individual was an employee, one would have to determine whether the employer had a right to stipulate what work was to be done by the employee, as well as the manner in which it was to be done. The element of control and supervision was thus used to determine whether the relationship was that of a contract of service (employment contract) or a contract for services (independent contract).

This test was first formulated in the case of Colonial Mutual Life Assurance Society Ltd v MacDonald where De Villiers CJ held:

“one thing appears to me to be beyond dispute and that is that the relation of master and servant cannot exist where there is a total absence of the right of supervising and controlling the workman under the contract …”

However, the test failed to take into account that the degree of control exercised by employers is dependent upon on the nature of the work and that some employees, by nature of their employment, were subjected to less control and supervision in performing their daily duties. An example of such employees is salespersons.

A second test referred to as the “organisation” test was developed to supplement the “control” test. The purpose of this test is to determine whether the person works as “part and parcel of the organisation”, by determining to what extent a worker is integrated into the employer's organisation. However this test too proved to be inadequate, and was dismissed by the courts due to its vagueness.

The need to address the inadequacies of these two tests resulted in the adoption of the “dominant impression test”. In using this test, the courts focus not only on one single factor,
but rather examine the relationship as a whole in order to obtain a dominant impression as to whether the relationship is that of an employer and employee, or an employer and an independent contractor.¹⁴

2.2.2 THE STATUTORY DEFINITION

An employee is defined in the section 213 of the LRA¹⁵ and section 1 of the Basic Conditions of Employment Act (hereinafter referred to as the “BCEA”)¹⁶ as:

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

An almost identical definition of an employee is also provided for in section 1 of the Employment Equity Act.¹⁷

The statutory definition of an employee was examined in South African Broadcasting Corporation v McKenzie¹⁸ where the Labour Appeal Court held that the first part of the definition refers to a person who works for another in terms of the common law contract of employment. The court pointed out that the second part of the definition was problematic and has been interpreted differently by the courts. The court referred to the case of Boumat v Vaughan¹⁹ on the one hand where it was held that there is “no reason why the ordinary meaning of the words ought not to be given effect to in the present circumstances”, and to Liberty Life Association of Africa Ltd v Niselow²⁰ on the other hand, where it was held that “[to] adopt a literal interpretation ... would clearly result in absurdity”. It was further pointed out by the LAC in this case that it has been accepted by the courts that an independent contractor is not an employee as defined by the Act.²¹

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¹⁴ Ibid.
¹⁶ 75 of 1997.
¹⁷ 55 of 1998.
¹⁹ (1992) 13 ILJ 934 (LAC) 939.
Paragraph (b) of the statutory definition of an employee is expressed in such wide terms that, if a literal interpretation were to be adopted, independent contractors, partners, agents and even suppliers could be regarded as employees. In determining what the legislature intended by the broad ambit of this part of the definition, it has been held that the purpose is “to limit the possibility of parties structuring their relationship in such a way as to exclude the application of the Act ....” In other words this part of the definition may in effect allow for the recognition of an employment relationship in instances where no formal employment contract exists. The nature of the relationship must however still be similar to an employment relationship and should not be akin to a contract with an independent contractor.

In Rumbles v Kwa Bat Marketing (Pty) Ltd the court was required to determine the preliminary issue of whether the applicant was an employee at the time that his employment was terminated. The court held that whilst the terms of the agreement between the parties are an appropriate point of departure, it does not define their legal relationship. In this regard van Niekerk AJ held that “what is required therefore is a conspectus of all the relevant facts including any relevant contractual terms, and a determination whether these holistically viewed establishes a relationship of employment as contemplated by the statutory definition”.

A similar conclusion was reached in the case of White v Pan Palladium SA (Pty) Ltd where the company contended that the applicant, who alleged to have been unfairly dismissed, was an independent contractor. The court held that in light of the statutory definition of an employee, the existence of an employment relationship does not depend solely on the conclusion of a contract recognised at common law as valid and enforceable. The court was of the view that “someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship”.

22 Du Toit Labour Relations Law 73.
26 2728.
In *Denel (Pty) Ltd v Gerber*\(^{27}\) the court dealt with the legal principles which may be applicable when determining whether a person is an employee or not. The question before the LAC was whether the respondent had been an employee of the appellant at the time of her alleged dismissal. The appellant argued that the respondent had been an employee of Multicare, a company with which the appellant had entered into an agreement to provide certain services. The respondent was the sole employee of Multicare who could provide those services.

The court pointed out that whether or not an individual is an employee or not, depends on the facts of each case in light of the relationship between the parties.\(^{28}\) The court referred to the case of *CMS Support Services (Pty) Ltd v Briggs*,\(^{29}\) where Mrs Briggs had registered a close corporation of which she was the sole member, for tax purposes, and then rather than taking up ordinary employment with CMS she requested that the company conclude a consultancy contract with her close corporation, to which the company agreed. In dealing with the subsequent unfair dismissal dispute referred by Briggs upon termination of the consultancy contract, the court concluded that she was not an employee. The court’s reasoning was based on the fact that Briggs, by virtue of the consultancy contract, elected not to be an employee in order to obtain certain (tax) benefits, and that she could accordingly not later claim to be an employee when faced with an alleged unfair dismissal. The approach adopted by the court was thus that “he makes his bed and must lie on it”.

Zondo JP in the Denel case criticised the abovementioned approach by the LAC in the Briggs case, and pointed out the flaw of this approach, being that it effectively allows the parties to agree to exclude the application of important legislation, such as the BCEA, thereby evading its obligation to objectively determine what the position is between the relevant parties.\(^{30}\) Thus in his view, a court must have regard to the realities of the relationship and that substance rather than form must determine the relationship.\(^{31}\)

\(^{27}\) (2005) 26 ILJ 1256 (LAC).
\(^{28}\) 1267.
\(^{29}\) (1998) 19 ILJ 271 (LAC).
\(^{30}\) Denel (Pty) Ltd v Gerber (2005) 26 ILJ 1256 (LAC) 1297.
\(^{31}\) 1296.
2.2.3 THE STATUTORY PRESUMPTION

In an attempt to overcome the difficulties associated with the definition of an employee, section 200A of the LRA and section 83A of the BCEA were enacted. These sections are identical and contain a statutory presumption of employment if certain factors are present. These sections provide as follows:

“(1) Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;
(b) the person's hours of work are subject to the control or direction of another person;
(c) in the case of a person who works for an organisation, the person forms part of that organisation;
(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
(e) the person is economically dependent on the other person for whom he or she works or renders services;
(f) the person is provided with tools of trade or work equipment by the other person; or
(g) the person only works for or renders services to one person.”

The effect of this section is that the person, who alleges that an employment relationship exists, must prove the presence of one or more of the factors listed in section 1 above, and he or she will then be presumed to be an employee. The other party must then rebut the presumption on a balance of probabilities. The application of this presumption is limited to persons who earn less than the amount determined by the Minister in terms of section 6(3) of the BCEA.

It has been suggested that judicial bodies will however, despite the enactment of section 200A, in effect still be applying the dominant impression test by weighing up the factors provided by the party in favour of an employment relationship against those provided by the other party not in favour of an employment relationship. As this is in any event already the

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32 S 200A Labour Relations Act.
33 Du Toit Labour Relations Law 79.
approach followed by the courts, one may ask what the actual significance of the introduction of this section is.

It has been submitted that the significance of this section is the importance placed on the criteria of economic dependence when determining whether a party to an employment relationship is an employee or not. It is evident from the courts decisions when deciding whether a worker is an employee, that emphasis is placed on ensuring that the protection of labour legislation is afforded to those who are most in need thereof. Thus only those categories of workers who earn less than the amount determined by the minister, and who are therefore usually more vulnerable, are able to rely on the presumption.

It has further been submitted that the presumption also significantly impacts on the interpretation of the definition in that firstly, the presumption clarifies that categories of workers whom the legislature intended to be covered by labour legislation. Secondly, the factors listed in the presumption must now clearly be taken into account when interpreting the definition of an employee. Furthermore, the language of the presumption also provides important considerations which must be taken into account by courts when interpreting the definition of an employee. The presumption specifically states that it applies to “a person who works for, or renders services to”, thereby implying that the statutory definition of an employee should be interpreted as extending beyond the confines provided for in the common-law. This is further confirmed by the language of the presumption which provides that it will apply “regardless of the form of the contract”. Whether or not the legislature thereby intended a departure from the employment contract as identified by the courts, is debatable. It is submitted that the presumption should rather focus on a particular kind of contractual work relationship, based on vulnerability, rather than the employment contract per se.

The purpose of the introduction of the presumption is indicated in the Explanatory Memorandum to the first draft of the 2002 amendments to the LRA and BCEA, as being to assist those vulnerable workers who were either unable to assert their rights as employees or

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35 Ibid.
who were classified as independent contractors despite their dependence upon the organizations or persons to whom they provided services. The presumption thus addresses the issue of “disguised employment”, as well as the need for a purposive construction of the statutory definition of an employee. 39

The presumption of employment provides three primary criteria for indicating the presence of an employment relationship - the employer’s right of supervision and control; the employee forming an integrated part of the organization of the employer; and the employee’s economic dependence upon the employer. The presumption confirms that no single factor is decisive in determining the presence of an employment relationship, and it thus goes beyond the approach of the courts in suggesting additional factors that are indicative of an employment relationship. 40

2.3 THE DEFINITION OF AN EMPLOYER

An employer was defined in the 1956 LRA as “any person who employs or provides work for any person and remunerates or expressly or tacitly remunerates him or who … permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business …”. 41

The current LRA however does not provide a definition for employer, and it must therefore be taken to mean the converse of “employee”. Thus, if it has been established that an individual who works for an alleged employer, is in fact an employee, then it follows that the person whom the employee works for will be an employer. Generally one can accept that an employer is a natural or juristic person for whom an employee works, or whose business is assisted by an employee. 42

The difficulty which arises in respect of the definition of an employer is where the identity of the employer is in dispute. This occurs when for example subsidiaries in groups of companies

41 Labour Relations Act 28 of 1956.
42 Grogan Dismissal 24.
enter into employment contracts, as was the case in *Board of Executors Ltd v McCafferty*.\(^{43}\)

In this case the Board of Executors (“BOE”) group consisted of three entities: BOE 1938, BOE Limited and BOE Merchant Bank. Mr McCafferty was appointed as manager of BOE Merchant Bank; however he was paid his salary by BOE Limited and was also informed of his retrenchment in a letter from BOE Limited. When McCafferty referred an unfair dismissal dispute against BOE Merchant Bank, the court substituted BOE Limited as the respondent, which on appeal denied being the employer of McCafferty and claimed instead that all its employees were in fact employed by BOE Limited. In deciding this matter, the court held that on the facts of the case all three entities were in fact the employer of McCafferty due to the fact that BOE 1938 paid for the use of his productive capacity, BOE Merchant Bank supervised his productive capacity and BOE Limited encourage the development of that capacity for its purposes.\(^{44}\)

A further complication which may arise in respect of the definition of an employer is where multinational or foreign corporations are parties to an employment relationship. An example of where the court was required to adjudicate such an employment relationship was the case of *Pearson v Sheerbonnet South Africa (Pty) Ltd*,\(^{45}\) where Pearson was appointed head of an associated company in the United Kingdom. The court rejected his argument that the Sheerbonnet was his employer, and held that one must determine whose business Pearson assisted in conducting. The court held that this was in fact the UK company which controlled Sheerbonnet.

In some cases the courts have found it necessary to “lift the corporate veil”, meaning that the realities of the relationships and the true parties to the relationship will be considered, irrespective of the way in which the parties have used companies and close corporations to create what appears to be a relationship between an independent contractor and its client.\(^{46}\)

Although a natural person who owns or controls a corporate entity may not be sued by an employee, the court will pierce the corporate veil if it appears that the true employer is hiding behind the entity.\(^{47}\)

\(^{43}\) (1997) 1 *ILJ* 949 (LAC).

\(^{44}\) Grogan *Dismissal* 25.

\(^{45}\) (1999) 20 *ILJ* 1580 (LC).

\(^{46}\) Basson *et al Essential Labour Law* 35.

\(^{47}\) Grogan *Dismissal* 25.
In some cases the situation may arise where the courts must determine whether an employee may have more than one employer. In the case of *Footware Trading CC v Mdlalose*, the court held that Footware Trading’s subsidiary company was jointly and severally liable for Mdlalose’s unfair dismissal, and that separate juristic personality may be disregarded where a subsidiary is merely an alter ego or conduit of the principal company.

### 2.4 THE CONTRACT OF EMPLOYMENT

As discussed previously in this chapter, the first question which must be determined when resolving a labour dispute, is whether the parties are in fact “employees” and “employers” within the meaning and definitions provided for in our labour statutes. In answering this question the courts will generally commence their enquiry by examining the contract which the parties have entered into.

#### 2.4.1 THE ELEMENTS OF THE CONTRACT OF EMPLOYMENT

The contract of employment can be defined as a “voluntary agreement between two parties in terms of which one party (the employee) places his or her personal services or labour potential at the disposal and under the control of the other party (the employer) in exchange for some form of remuneration which may include money and/or payment in kind”.

The contract which parties to a work relationship conclude may be a *locatio conductio operarum* (contract of employment proper) or a *locatio conductio operis* (a contract for the provision of work). An example of the latter is a contract entered into with an independent contractor, and despite the inclusion of the provision of work and services, it is not a contract of employment.

Both parties must enter into the employment contract freely and voluntarily. The parties are not required to comply with any formalities when concluding the contract of employment,

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48 Ibid.
49 Grogan *Dismissal* 26.
50 Basson et al *Essential Labour Law* 35.
however there are some statutes which require certain employment contracts to be reduced to writing.

The parties may agree on any type of work which the employee is to perform, and may regulate their rights and duties as they wish, provided it is not illegal or *contra bonos mores* (contrary to good morals).\(^\text{52}\) However, if the contract is silent on particular terms and conditions which are provided for in legislation or collective agreements, then such provisions will be read into the contract as if the parties had agreed to them.\(^\text{53}\)

The duration of the employment contract will either be for a fixed term, or indefinite. A fixed term employment contract terminates on a date specified in the contract or upon the occurrence of a specified event.\(^\text{54}\) An indefinite employment contract on the other hand, continues until it is terminate by agreement, by the giving of notice, by fundamental breach, retirement, or one of the other grounds accepted by law.\(^\text{55}\)

### 2.4.2 THE IMPORTANCE OF THE CONTRACT OF EMPLOYMENT

From our case law it is clear that the courts view the primary source from which to establish the nature of the parties’ work relationship, as being the contract concluded by the parties.\(^\text{56}\) It has been held particularly that the contract alone is decisive, and facts that do not tend to prove the contract are irrelevant in determining the nature of the relationship.\(^\text{57}\) However, there has been a significant change in the emphasis on the employment contract, and the courts now take the view that one must examine factors relevant to identify a relationship, rather than a contract of employment, when determining the existence of an employment relationship. The question which now arises is whether a worker can be an employee where he has not entered into a contract of employment?\(^\text{58}\)

\(^{52}\) Grogan *Workplace Law* 30.

\(^{53}\) 35.

\(^{54}\) 41.

\(^{55}\) 42.


\(^{57}\) *Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB* 1976 (4) SA 446 (A) 455A-C.

\(^{58}\) Bosch “Can Unauthorized Workers Be Regarded as Employees for the Purposes of the Labour Relations Act?” 2006 27 *ILJ* 1355.
In the case of *NUCCAWU v Transnet Ltd t/a Portnet* the employees signed a casual employment agreement, in terms of which they formed a pool workforce from which the employer would select workers on a daily basis as needed. In determining whether these workers were in fact employees, the court held that they were a “special class” of employees, and the fact that the company had stated that it would employ workers from the pool when extra staff were required for its daily requirements, was sufficient to show that the workers were employees within the definition contained in the LRA. Of particular reference in this case is that the court did not assess whether a contract had been concluded between the parties, indicating that it was in fact more concerned with the nature of the relationship between the parties.

The court in *Rumbles v Kwa Bat Marketing (Pty) Ltd* confirmed the aforementioned view and held that the focus should be on the nature of the relationship between the parties which can be established with reference to all relevant factors, including contractual terms if there are any. Similarly, in *White v Pan Palladium SA (Pty) Ltd* the court held that the statutory definition of ‘employee’ does not depend solely on the conclusion of a contract.

It accordingly appears that, whilst the contract of employment is an important factor in determining whether a party to a working relationship is in fact an employee, the contract of employment is by no means the deciding factor.

### 2.4.3 THE UNLAWFUL CONTRACT OF EMPLOYMENT

One of the requirements for the conclusion of a valid contract is legality. An illegal agreement is invalid and will not give rise to obligations, and in some instances the agreement will still constitute a contract, but an unenforceable one.

Agreements which are concluded *contra bonos mores* or contrary to public interest or policy are regarded as illegal. In some instances their very conclusion is usually prohibited by

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59 (2000) 21 ILJ 2288 (LC).
60 Bosch 2006 27 ILJ 1356.
64 Van der Merwe *et al* *Contract* 76.
statute, as for example the sale of drugs which is prohibited by the Drugs and Drug Trafficking Act.\textsuperscript{65}

An agreement which is legally concluded, may nevertheless be illegal if the performance which is the subject matter of the agreement, is illegal. Furthermore if both the conclusion and the performance of the agreement are illegal, the agreement may still be illegal as a result of the purpose of its conclusion. In \textit{Richards v Guardian Assurance Co}\textsuperscript{66} a building which was described as a “dwelling house” in an insurance contract, was in fact being used as a brothel. The court held that the contract was \textit{contra bonas mores}, and was accordingly void.

These principles also apply to the contract of employment, which, if concluded for an unlawful purpose or which are illegal in any other way, will not be enforced by the courts. The courts have thus held in the past that a worker which is party to an unlawful employment contract, will not be regarded as an employee and will effectively not be afforded any protection under our labour legislation. The view of the courts in this regard has recently changed, as will be discussed in detail in the chapters that follow.

\begin{footnotesize}{\footnotesize
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\item\textsuperscript{65} Drugs and Drug Trafficking Act 140 of 1992.
\item\textsuperscript{66} 1907 TH 24.
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CHAPTER 3
THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES
AND RELEVANT INTERNATIONAL LAW

3.1 INTRODUCTION

One of the purposes of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution of the Republic of South Africa ("the Constitution"). The LRA provides further that when its provisions are interpreted, effect must be given to its primary objects in compliance with the Constitution as well as the public international law obligations of the Republic.

Section 23 of our Constitution provides that everyone has the right to fair labour practices. This right is contained in the Bill of Rights, which applies to all law, and binds the legislature, the executive, the judiciary and all organs of state. Our Constitution provides further that when applying a provision of the Bill of Rights, a court, in order to give effect to a right in the Bill, must apply or develop the common law to the extent that legislation does not give effect to that right; and may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) of the Constitution. Section 39 of the Constitution provides that when interpreting the Bill of rights, a court, tribunal or forum must consider international law.

The purpose of this chapter is to explore the scope and effect of the Constitutional right to fair labour practices, and also to explore South Africa’s public international law obligations which must be complied with.

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67 The LRA was enacted prior to our final Constitution and therefore refers to s 27 of the Interim Constitution, which has now been replaced with s 23 of our current Constitution.
69 S 1 Labour Relations Act.
70 S 3 Labour Relations Act.
3.2 THE RIGHT TO FAIR LABOUR PRACTICES

Section 23(1) of the Constitution, provides that everyone has the right to fair labour practices.\(^73\) The wording of this section has resulted in much debate in respect of the widened scope of this right provided for by the use of the term “everyone”, and also with regards to what is meant by a “fair labour practice”.\(^74\)

The Labour Court plays a crucial role in ensuring that this Constitutional right is given effect to, and the Constitutional Court has held that legislation will always be subject to constitutional scrutiny to ensure that the rights of workers and employers, as entrenched in the Constitution, are honoured.\(^75\)

3.2.1 THE MEANING OF “EVERYONE”

The Constitutional Court has held that everyone refers to every person, and includes both natural and juristic persons.\(^76\)

It has however been suggested that “everyone” should be interpreted with reference to the object of the sentence in section 23(1), being “labour practices”.\(^77\) In accordance with this view, since labour practices arise as a result of the relationship between workers, employers and their respective organisations, it is submitted that the term “everyone” should be understood in this sense only. This would mean that only those persons and organisations specifically named in section 23, namely workers, employers, trade unions and employer’s organisations, should be included.

3.2.2 THE MEANING OF “FAIR LABOUR PRACTICE”

In order to determine the ambit of this Constitutional right, one must determine what is meant by a fair labour practice.

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\(^{76}\) *National Education Health & Allied Workers Union v University of Cape Town & Others* (2003) 24 ILJ 95 (CC) 112.
The Constitutional Court held in *NEHAWU v UCT*\(^{78}\) that this concept is incapable of precise definition and that what is fair depends upon the circumstances of each particular case and essentially involves a value judgment. The court held further that it is thus neither necessary nor desirable to define this concept.\(^{79}\) Ngcobo J in this judgment expressed his view that the focus of section 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both.\(^{80}\)

### 3.2.3 THE DISTINCTION BETWEEN THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES, AND THE UNFAIR LABOUR PRACTICE PROVISION IN THE LRA

As pointed out above, one of the purposes of the LRA is to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution.\(^{81}\) What then, is the relationship between the Constitutional right to fair labour practices, and the unfair labour practice provision in the LRA? This question has not yet been determined by the courts.

However, in *NEWU v CCMA and Others*\(^{82}\) an employer referred an unfair labour practice dispute to the CCMA, as a result of his employee’s resignation without notice. The CCMA held that it did not have the necessary jurisdiction to hear the matter, as the unfair labour practice definition in the LRA did not extend to those committed by employees. NEWU subsequently approached the Labour Court with a view to having this decision by the CCMA reviewed on the ground that, *inter alia*, it is invalid as being inconsistent with sections 9, 23(1) and 34 of the Constitution.\(^{83}\) At the time of the referral, ‘residual unfair labour practices’ were regulated by item 2(1) of part B of schedule 7 to the LRA, which was repealed by the Labour Relations Amendment Act.\(^{84}\) Unfair labour practices are now regulated by sections 185, 191, 193 and 194 of the LRA.

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78 (2003) 24 *ILJ* 95 (CC).
79 110.
80 114.
81 S 1 Labour Relations Act.
82 (2003) 24 *ILJ* 2335 (LC).
83 2336.
84 Labour Relations Amendment Act 12 of 2002.
The court came to the conclusion that although the then Item 2 of schedule 7 did not provide for the commission of an unfair labour practice by an employee, this did not mean that the item was necessarily unconstitutional. In Landman J’s view it meant no more than that the LRA in that instance did not give effect to section 23 of the Constitution, but that the LRA is not, in any event, intended to regulate exhaustively the entire concept of a fair labour practice contemplated by the Constitution, as this field is too wide to be contemplated by a single statute. The court accordingly dismissed the Review Application, but held that if NEWU wished to pursue the unfair labour practice which is not regulated by the LRA or any other statute, it could nevertheless approach a court of competent jurisdiction by relying on section 23 of the Constitution.

In Ntlabezo & Others v MEC for Education, Eastern Cape & Others the High Court distinguished between a ‘residual’ unfair labour practice and a ‘general’ unfair labour practice, and held that the LRA does not deal with general labour practices as provided for in the Constitution. The court accordingly held that the Labour Court lacked jurisdiction to hear disputes involving a general unfair labour practice. The decision of the court thus suggests that the unfair labour practice protection afforded by the LRA is distinct from that provided for in the Constitution.

3.2.4 WHEN MAY AN APPLICANT RELY DIRECTLY ON SECTION 23(1)?

It is not entirely clear under which circumstances an applicant may rely directly on the Constitution where no legislation provides for a practice which may be unfair. In NAPTOSA v Minister of Education, Western Cape & Others it was held that one should not rely directly on the Constitution, as this would result in the development of two streams of jurisprudence. The court held further that if the LRA is found not to adequately give protection to the Constitutional right, then the LRA should be amended accordingly.

85 NEWU v CCMA and Others (2003) 24 ILJ 2335 (LC) 2337.
86 Ibid.
87 [2002] 3 BLLR 274 (Tk).
88 Du Toit Labour Relations Law 484.
89 (2001) 22 ILJ 889 (C).
Similarly, in *Moloka v Greater Johannesburg Metropolitan Council*\textsuperscript{90} the Labour Court held that it did not have jurisdiction to hear the applicant’s claim for an unfair labour practice based directly on section 23 of the Constitution. The court held that a dispute relating to reward, payment or remuneration falls within the collective bargaining structures and thus falls outside the jurisdiction of this court. The fact that the applicant relied directly on section 23 of the Constitution did not, in the Judge’s view, take the matter any further.\textsuperscript{91} It was held that the legislature, in enacting s 23 of the Constitution, did not intend the section to be used by an employee, who was not entitled to a right to a benefit, to persuade an unwilling employer to give her/him or to create an entitlement to such benefit which she/he was not entitled to.\textsuperscript{92}

On the other hand however, in the case of *Simela & Others v MEC for Education, Province of the Eastern Cape & Another*\textsuperscript{93} the Labour Court concluded that an employee is not precluded from relying directly on the Constitution when enforcing its right to fair labour practices.

### 3.3 THE IMPORTANCE OF INTERNATIONAL LAW

In interpreting the relevant provisions of the LRA, it is necessary to consider the constitutional and statutory interpretive framework within which such interpretation must take place.\textsuperscript{94}

Section 39(1) of the Constitution provides:

> “When interpreting the Bill of Rights, a court, tribunal or forum –
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
> (b) must consider international law; and
> (c) may consider foreign law.”

The importance of international standards is also emphasized by section 233 of the Constitution, which regulates the application of international law.\textsuperscript{95} This section provides:

\textsuperscript{90} (2005) 26 *ILJ* 1978 (LC).
\textsuperscript{91} 1982.
\textsuperscript{92} 1983.
\textsuperscript{93} [2001] 9 *BLLR* 1085 (LC).
\textsuperscript{94} *United National Breweries (SA) Ltd v Khanyeza & Others* (2006) 27 *ILJ* 150 (LAC).
“When interpreting any legislation, every Court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

The LRA provides specifically that any person applying the Act must interpret its provisions in compliance with the public international law obligations of the Republic.\(^{96}\) The LRA provides further that one of the primary objects of the Act is to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation.\(^{97}\)

An example of the application of this provision in a labour context, can be seen in the case of \textit{South African National Defence Union v Minister Of Defence & Another},\(^{98}\) where the Constitutional Court held that the conventions and recommendations of the International Labour Organization (hereinafter referred to as the “ILO”), one of the oldest existing international organizations, are important resources for considering the meaning and scope of “worker” as used in section 23 of the Constitution.\(^{99}\)

In \textit{NUMSA & others v Bader Bop (Pty) Ltd & another}\(^{100}\), the Constitutional Court confirmed the above and noted that in interpreting section 23 of the Constitution, an important source of international law will be the conventions and recommendations of the ILO.

### 3.3.1 CONVENTIONS AND RECOMMENDATIONS OF THE ILO

As referred to above, the Constitutional Court has confirmed that the major source of South Africa’s public international law obligations in respect of labour law is the conventions and recommendations of the ILO. South Africa is a member country of the ILO, which is seated in Geneva.\(^{101}\) The ILO has built up a set of principles which regulate labour matters, through

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\(^{96}\) S 3(c) Labour Relations Act.

\(^{97}\) S 1(b) Labour Relations Act.

\(^{98}\) (1999) 20 ILJ 2265 (CC) 2278.

\(^{99}\) \textit{Ibid}.

\(^{100}\) (2003) 24 ILJ 305 (CC).

\(^{101}\) \textit{Basson et al Essential Labour Law} 13.
its numerous Conventions and Recommendations. Conventions which have been ratified by South Africa constitute binding obligations in public international law.

ILO Conventions have had a significant impact in the development of South African Labour law, particularly prior to the LRA, where the Industrial Court relied on the principles laid down in these instruments. Whilst there is as yet no convention dealing particularly with the scope of an employment relationship, an important point of departure is to examine the scope of ratified conventions that must be taken into account when interpreting the LRA and other labour legislation.

An example of some of the most important ILO Conventions which South Africa has ratified, are the following: Freedom of Association and Protection of the Right to Organize Convention, Right to Organize and Collective Bargaining Convention, Forced Labour Convention, Abolition of Forced Labour Convention, Discrimination (Employment and Occupation) Convention, Equal Remuneration Convention, Minimum Age Convention and Worst Forms of Child Labour Convention.

An important source of international law with regards to unfair dismissals is the ILO Convention 158 of 1982. Article 4 thereof lays the foundation for South African legislation in respect of unfair dismissals based on misconduct, incapacity and operational requirements. Also of importance is the ILO’s Recommendation 198 of 2006, which suggests that the determination of whether a worker is an employee, should be made with reference to the performance of the work and remuneration of the worker, irrespective of any contractual or other arrangement that may indicate otherwise.

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102 Ibid.
103 14.
104 Benjamin 2004 25 ILJ 800.
105 National Education Health & Allied Workers Union v University of Cape Town & Others (2003) 24 ILJ 95 (CC).
106 87 of 1948.
107 98 of 1949.
108 29 of 1930.
110 111 of 1958.
111 100 of 1951.
113 182 of 1999.
114 Equity Aviation Services (Pty) Ltd v CCMA & others [2008] 12 BLLR 1129 (CC) 1138.
CHAPTER 4
THE LABOUR RIGHTS OF ILLEGAL IMMIGRANTS IN SOUTH AFRICA

4.1 INTRODUCTION

South Africa has attracted an increasing number of foreigners since the beginning of our new Constitutional dispensation in 1994. A majority of these foreigners are in South Africa illegally, however it is extremely difficult to ascertain exactly how many illegal immigrants are in South Africa due to the difficulty in tracking their clandestine movements. The prevailing views of many South Africans are that this country is being swamped by illegal immigrants, mainly from neighbouring states and in May 2008 Xenophobia became a harsh reality.

Whilst there are the obvious normal reasons why people from other countries (mostly African countries) are migrating to South Africa, such as opportunities for trade, selling of expert knowledge, studies and visits; there are also other factors which have resulted in the sudden influx of foreigners, the most obvious of which being the crisis in Zimbabwe.

The purpose of this chapter is to analyse what labour rights, if any, are afforded to illegal immigrants in South Africa. The question whether illegal immigrants working in South Africa are protected by its labour legislation, is an important one given the vulnerability of these illegal workers.

In answering this question it is necessary to look at the provisions of the Immigration Act (hereinafter referred to as “the Act”) and the effect thereof on the employment of illegal immigrants. It is also necessary to analyse the relevant case law, in particular the recent

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117 Ibid.
120 Norton (2009) ILJ 68.
121 Immigration Act 13 of 2002.
Labour Court decision in *Discovery Health Limited v CCMA & others*, where the Labour Court held that an illegal worker may have access to the dispute-resolution mechanisms of the CCMA.

4.2 THE HISTORICAL POSITION

South Africa has a long history of immigration, dating back to Colonialization and the resultant influx of Dutch and British immigrants. Most of these migrations took place between the seventeenth and nineteenth centuries, and continued throughout the Apartheid regime where, in an effort to increase the white community and to acquire skilled people, South Africa opened its doors to European immigrants. This was however not extended to black migrant workers who, during Apartheid, were refused permanent residence.

Immigration was initially governed by the Aliens Control Act, however this was later declared unconstitutional and inconsistent with international standards. This act was accordingly replaced by the Immigration Act in 2002.

4.3 CURRENT STATUS OF ILLEGAL IMMIGRANTS IN SOUTH AFRICA

South Africa is estimated to have approximately five million illegal immigrants, of which an estimated three million are Zimbabweans. As stated earlier, it is of course exceedingly difficult to accurately measure the numbers of illegal immigrants and these figures thus remain a mere estimate.

One of the main problems associated with the large number of illegal immigrants in this country is firstly that they are placing strain on South Africa’s already scare resources such as housing and healthcare. Secondly, illegal immigrants are competing with South Africans for

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126 13 of 2002.
jobs which are already scarce, and thus aggravating the unemployment situation. Furthermore it has been suggested that the increasing amount of illegal immigrants have also contributed to the high level of crime in South Africa.128

Globalisation has also had a considerable impact on international labour migration, and as a result thereof there has been a significant increase in the number of people who migrate in order to escape poverty, unemployment and other social, economic and political pressures in their home countries.129

Illegal immigrants are by virtue of their circumstances easily exploited and often the victims of cheap labour, corruption, eviction and assault.130 It is for this reason necessary to determine to what extent illegal workers are protected by South Africa's labour legislation.

### 4.4 THE IMMIGRATION ACT

The Immigration Act131 came into effect on 12 March 2003, and repealed the Aliens Control Act.132 This Act gives immigration officers certain administrative powers in dealing with persons being suspected or regarded as illegal immigrants.133

#### 4.4.1 THE PURPOSE AND CONTENT OF THE ACT

According to the Preamble of the Act, the Act was introduced in order to regulate the admission of foreigners to, their residence in, and their departure from the Republic and for matters connected therewith.134 The Preamble provides further that the Act aims to put a system of immigration controls into place which will promote economic growth through *inter alia* the employment of needed foreign labour and the entry of exceptionally skilled or qualified people.135 It provides further that the South African economy may have access at all

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130 Ibid.
131 13 of 2002.
133 *Sibande v CCMA & Others* (2010) 31 *ILJ* 441 (LC) 447.
134 Preamble to the Immigration Act.
135 Paragraph (d) Preamble to the Immigration Act.
times to the full measure of needed contributions by foreigners. With the emphasis on “needed” and “exceptionally skilled” people, one could draw the inference that only those foreigners who are needed, are welcome.

Section 38(1) of the Immigration Act deals with the employment of foreigners and provides that:

“(1) No person shall employ -
(a) an illegal foreigner;
(b) a foreigner whose status does not authorise him or her to be employed by such person; or
(c) a foreigner on terms, conditions or in a capacity different from those contemplated in such foreigner’s status.”

Section 49(3) of the Immigration Act provides further that:

“Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year, provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding three years without the option of a fine.”

The Act provides that a foreigner must be in possession of a valid visa, and will be deemed to be in possession of such a visa if he or she has one of the permits listed in the act, which includes a work permit. The holder of a visitor's permit may not work, unless authorized by the Director-General of Home Affairs.

Four types of work permits are provided for in the Act, namely quota permits, general work permits, exceptional skills permits and intra-company transfer permits.

A quota work permit may be issued to a foreigner who falls within a specific professional category or within a specific occupational class determined by the Minister at least annually by notice in the Gazette after consultation with the Ministers of Labour and Trade and

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136 Paragraph (h) Preamble to the Immigration Act.
138 S 10A Immigration Act.
139 S 11(2) Immigration Act.
Industry. A recent Gazette listed, for example, actuaries (500 sought), astronomers (200 sought), civil engineers (1,000 sought) and veterinarians (250 sought).

A general work permit may be issued to a foreigner if the prospective employer can show that despite diligent search he or she has been unable to employ a person in the Republic with qualifications or skills and experience equivalent to those of the applicant, and that the terms and conditions under which he or she intends to employ that foreigner, including salary and benefits, are not inferior to those prevailing in the relevant market segment for citizens, taking into account applicable collective bargaining agreements and other applicable standards.

An exceptional skills work permit may be issued to an individual possessing exceptional skills or qualifications.

An intra-company transfer work permit may be issued to a foreigner who is employed abroad by a business operating in the Republic in a branch, and who by reason of his or her employment is required to conduct work in the Republic for a period not exceeding two years.

4.4.2 INTENTION OF THE LEGISLATURE

From the preamble of the Act it is evident that the intention of the legislature is to reduce the presence of illegal foreigners and that whilst their services can be utilized when necessary, their presence should not impact adversely on the employment and training of South Africans.

The Immigration Act places a duty on employers to check the status of employees and not to employ illegal foreigners. Non-compliance by employers will result in the employer being

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140 S 19(1) Immigration Act.
142 S 19(2) Immigration Act.
143 S 19(4) Immigration Act.
144 S 19(5) Immigration Act.
liable on conviction to a fine or imprisonment not exceeding one year (for a first conviction). Similarly, foreigners are also obliged to abide by the terms and conditions of their status, failing which they shall be guilty of an offence and liable on conviction to a fine or imprisonment not exceeding eighteen months.

There is nothing in the Act which expressly nullifies contracts of employment concluded with illegal immigrants, and the question often arises whether this is the effect which the legislature sought to achieve. In answering this question consideration must be given to the language of the particular provision. Section 38 of the Act is peremptory in that use is made of the word “shall”. Peremptory language is considered to be a strong indication that actions contrary to the provision will be invalid. This would mean that contracts of employment concluded contrary to the provision will be invalid.

There are however opposing views in this regards, particularly with reference to the criminal sanction imposed by the Act. One view is that the Act creates a criminal sanction for the employer only, thereby creating the impression that the legislature sought to penalize the employer only and that the legislature did not intend depriving foreign workers of their contractual rights. It could be that the legislature thereby intended merely to deter employers from hiring illegal foreigners, and that the sanctions provided for in the Act were enough to achieve this purpose, without it becoming necessary to invalidate the employment contracts concluded contrary to the Act.

Another view is that the Act imposes criminal sanctions on both the employer and the employee, and therefore intended that contracts concluded with illegal foreigners will be null and void, thus preventing the employment of illegal foreigners over South Africans. It is submitted in favour of this view that when considering the language of the Act, it is more reasonable to argue that a contract of employment entered into in contravention of this Act is invalid, rather than valid.

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146 S 43(a) Immigration Act.
147 S 49(6) Immigration Act.
149 Ibid.
151 Ibid.
When turning to the language of the Act, it is submitted that four factors confirm that the legislature intended that non-compliance with the Act should result in nullity. Firstly, as mentioned previously, the prohibition makes use of peremptory language (“No person shall”). Secondly, the use of the words “illegal” and “status does not authorise him or her to be employed” indicate that the language of the section is negative. Thirdly, sections 49(3) and 49(6) impose a criminal sanction. Finally, permitting employment of illegal foreigners or those without work permits would foster employment relations which the legislature seeks to prevent.\textsuperscript{154}

It has further been submitted in support of this view that a construction of an interpretation of the Act which allows employment relationships to exist with illegal foreigners, in contravention of the Act, despite the language and peremptory provisions of the Act, would unreasonable strain the language and bring about a situation with the Act particularly sought to prevent and punish.\textsuperscript{155}

In a recent Labour Court decision, concerning the alleged unfair dismissal of an illegal immigrant, the former view was adopted and confirmed. This case is discussed in detail below.

\textbf{4.4.3 \hspace{1mm} THE NEW IMMIGRATION BILL}

The new Immigration Bill 2010 was introduced to Parliament on 1 October 2010, in an attempt by Home Affairs to deal with ongoing problems in the permits department. The department is suffering a backlog of nine months for the processing of normal work permit applications, which used to take thirty days.\textsuperscript{156}

Many parties have raised their concerns in response to this new Immigration Bill, and the Law Society of the Northern Province has stated that whilst the Immigration Act undoubtedly needed to be amended, a number of the proposed amendments in the Bill “require greater

\textsuperscript{154} \textit{Ibid.}
\textsuperscript{155} Norton (2009) \textit{ILJ} 77.
reflection”.\textsuperscript{157} Some of the proposed changes include removing the right of representation in immigration matters, requiring all applications to be submitted in person at a Home Affairs office or an embassy overseas (in the past couriered applications have been acceptable), prescribed investment categories for business visas, a new permit called the Critical Skills permit in place of the Exceptional Skills permit, change in the process to be followed when changing status and conditions of a current permit (for example a change from a study permit to a work permit), and Intra Company and Corporate Work permits will be subject to a prescribed list and requirements.\textsuperscript{158}

A further concern raised by the Law Society of the Northern Province in particular, was that the “principles of the bill fly in the face of the stated intentions of the Immigration Act, which are to permit an easy flow of highly skilled foreigners and investors into South Africa”.

The Bill will still have to undergo many processes and requirements before being passed as an Act by Parliament.

\textbf{4.5 RELEVANT CASE LAW}

There are only a few cases dealing with unfair dismissal disputes involving illegal immigrants, most of which have gone no further than the CCMA.

In 2001 the case of \textit{Moses v Safika Holdings (Pty) Ltd}\textsuperscript{159} was heard in the CCMA. In this case the applicant (hereinafter referred to as “Moses”) who was an American citizen, was offered a position as an adviser for the respondent company (hereinafter referred to as “Safika Holdings”), on condition that he obtain the necessary work permit as required by the Aliens Control Act which was still in force at the time. Moses accepted the offer however he failed to obtain the necessary work permit. When the contract of employment was terminated (for reasons not mentioned in the arbitration award), Moses referred an unfair dismissal dispute to the CCMA. The Commissioner was first required to decide the a point \textit{in limine} raised by the respondent, namely whether Moses is debarred from pursuing the dispute under the LRA


\textsuperscript{158} Isaacson “New Immigration Bill” (2010).

\textsuperscript{159} (2001) 22 ILJ 1261 (CCMA).
given that he is a citizen of the United States of America and was not in possession of the required work permit.

The Commissioner turned firstly to the employment contract and held that the general principles of contract apply, given that an employment contract is not different from any other contract. He noted that the maxim *ex turpi causa non oritur actio* (i.e. out of dishonourable cause no action arises) is still applicable in South African law, and referred in that regard to the case of *Schierhout v Minister of Justice*,¹⁶⁰ where Innes J held:

> “It is a fundamental principle of our law that a thing done contrary to the direct provision of the law is void and of no effect. . . . The mere prohibition operates to nullify the act. . . . And the disregard of peremptory provisions of a Statute is fatal to the validity of the proceedings affected.”

The commissioner then turned to the definition of “employee” in the LRA and noted that whilst a literal interpretation thereof would include illegal immigrants, in his view the word 'employee' does not cover those employees whose acts are unlawful. He held further that all legislation must be interpreted to mean that only lawful conduct is approved, and the mere fact that the LRA is silent in this regard does not imply that unlawful conduct is condoned.

The commissioner provided the following example in support of his view: “If A, an employer, hires B, an employee, to hijack cars and after six months A fires B, B cannot thereafter come to the CCMA or the Labour Court to challenge the unfairness of the dismissal for the simple reason that out of dishonourable cause no action arises.” The Commissioner held accordingly that in his view, the obligation for a foreigner to possess a work permit means that he or she cannot be allowed to work without it.

The commissioner also dealt briefly with the use of the word “everyone”, as contained in section 23 of the Constitution, and held that it should be limited as the nature of such a right is that it is impossible to enforce it, and that if it is not limited then the resources of the CCMA and the Labour Court would be stretched to the limit as it would open floodgates for all illegal immigrants to challenge the fairness of their dismissal.

¹⁶⁰ 1926 AD 99 109.
In light of the above, the Commissioner concluded that Moses was not an “employee” in terms of the LRA as the employment contract was void \textit{ab initio} due to the contravention of the Aliens Control Act. The point \textit{in limine} was accordingly upheld and it was held that the CCMA does not have jurisdiction to entertain the dispute.

In the subsequent case of \textit{Vundla v Millies Fashions} 161 a Zimbabwean national who was employed as a sales assistant in a dress shop, was dismissed when her employer discovered that she did not have the required work permit. The commissioner in his award states that “The country’s attitude towards illegal immigrants and those who are employing and/or harbouring them is that they should be dealt with severely”. Although particularly referring in that regard to “those who are \textit{employing} them” (own emphasis added), he dismissed the applicant’s referral without any legal analysis and held that there had been no dismissal. Similarly, the CCMA held in the case of \textit{Georgieva-Deyanova v Craighall Spar} 162 that it had no jurisdiction to hear the matter as the employment contract was void \textit{ab initio} as a result of the applicant not being in possession of the required work permit.

From these cases it is clear that the general legal position which was followed was that workers who have no work permits and enter into employment contracts, are not employees as defined in the LRA as their contract of employment is void \textit{ab initio} as a result of their contravention of the Immigration Act.

\section*{4.6 \textit{DISCOVERY HEALTH v LANZETTA AND OTHERS}}

In this case the Labour Court was required to determine whether a jurisdictional ruling issued by the CCMA should be reviewed and set aside. The commissioner had ruled that the applicant (hereinafter referred to as “Lanzetta”) was an employee, despite not being in possession of the required work permit, and that the CCMA had the required jurisdiction to determine his unfair dismissal dispute. Before the matter proceeded to Arbitration, the respondent company (hereinafter referred to as “Discovery Health”) filed a Review Application to set aside the commissioner's jurisdiction ruling.

\footnotesize
\begin{itemize}
\item \textsuperscript{161} (2003) 24 \textit{ILJ} 462 (CCMA).
\item \textsuperscript{162} (2004) 9 \textit{BALR} 1143 (CCMA).
\end{itemize}
In hearing this application, the Labour Court sought to answer the complex and controversial question: is a foreign national who works for another person, without a work permit issued under the Immigration Act, an “employee” as defined by the LRA?\(^{163}\)

### 4.6.1 THE FACTUAL BACKGROUND

Lanzetta is an Argentinean national who came to South Africa on 21 January 2001 on a study visa, which was valid until 15 January 2002 and later extended to 31 December 2002. Lanzetta thereafter on 1 January 2003 obtained a temporary residence permit, which was valid for a period of three months. He also obtained a work permit on 8 May 2003 which was valid until 31 March 2004. The work permit was subsequently extended to 31 December 2005 to allow Lanzetta to work for a company known as Multi-Path Customer Solutions (Pty) Ltd, only. This work permit forms the subject of this dispute.\(^{164}\)

On 18 April 2005, Lanzetta was offered employment with Discovery Health as a call centre agent, with effect from 1 May 2005. Lanzetta accepted the offer. Lanzetta claims that in September 2005, he asked his manager to provide him with the necessary documentation to enable him to renew his work permit, and that these documents were only furnished to him on 2 December 2005. Lanzetta claims that Discovery Health’s delay in providing him with the papers resulted in the expiry of his work permit at the end of December 2005.

On 4 January 2006, Lanzetta was called to a meeting with the managers of the company where he received a letter informing him that it had come to the company’s attention that his work visa had expired, and that his employment at Discovery Health was terminated with immediate effect as there was no longer a legal basis for his employment.\(^{165}\)

Lanzetta subsequently refer an unfair dismissal dispute to the CCMA.

\(^{163}\) *Discovery Health Limited v CCMA & others* (2008) 29 ILJ 1480 (LC) 1483.

\(^{164}\) 1485.

\(^{165}\) 1485.
4.6.2 THE FINDINGS OF THE CCMA

The parties agreed at the arbitration hearing that the Commissioner should determine, as a preliminary point, whether the CCMA had jurisdiction to arbitrate Lanzetta’s claim.

The arguments submitted by both parties at the arbitration hearing centred around the definition of “employee” as contained in section 213 of the LRA. Discovery Health argued that this definition contemplated an underlying contract of employment and that as the contract between the parties was void *ab initio* due to being prohibited by the Immigration Act, Lanzetta was not an employee as defined in the LRA.\(^\text{166}\)

The argument submitted by Lanzetta on the other hand, was that the LRA’s definition of “employee” is based on an employment relationship which goes beyond a mere contract of employment. Accordingly it was argued that even though the contract of employment concluded between the parties may have been invalid as a result of Lanzetta not being in possession of a valid work permit, this invalidity does not extend to the employment relationship itself.\(^\text{167}\)

The Commissioner in his ruling makes no definitive finding on the validity of the contract concluded between the parties, and whilst referring to case law that may suggest that the contract was invalid, his focus in deciding the matter was on the basis of an employment relationship, rather than the employment contract. The Commissioner in this regard agreed with the view of Craig Bosch in an article entitled “Can Unauthorized Workers be Recognised as Employees for the Purposes of the LRA?”\(^\text{168}\) which is that the concept of an employment relationship is an appropriate vehicle to extend the protections of the LRA to “unauthorised workers”.

The Commissioner accordingly ruled that the CCMA had jurisdiction to determine the dispute, and found further that Lanzetta has established the existence of a dismissal. This is contrary to the view traditionally adopted by Commissioners, who had previously always held

\(^\text{166}\) 1486.

\(^\text{167}\) *Ibid.*

\(^\text{168}\) (2006) 27 *ILJ* 1342.
that due to the nullity of employment contracts concluded by illegal immigrants, they cannot be employees in terms of the LRA.\textsuperscript{169}

The Commissioner concluded as follows:

“While it seems to me to be obvious that an employer cannot be required to continue the employment of an illegal foreigner or a foreigner whose specific work permit does not permit the employer to employ him that does not mean that the protections afforded to employees by the Act cannot apply to such foreigners prior to decisions being made in this regard.”

\textbf{4.6.3 THE LABOUR COURT JUDGMENT}

Discovery Health filed a Review Application whereby it sought to review and set aside the Commissioner’s jurisdictional ruling. The question which the Labour Court was accordingly required to decide was whether the decision reached by the Commissioner was one which a reasonable Commissioner could reach.

In order to determine whether the Commissioner erred in concluding that the CCMA had jurisdiction to entertain Lanzetta’s claim, van Niekerk AJ dealt with two separate but related enquiries. The first issue which required determination relates to the validity of the contract of employment concluded between the parties. If the contract is invalid, the second issue which arises is whether the conclusion is of any consequence, i.e. whether the definition of “employee” in section 213 of the LRA is necessarily underpinned by a contract of employment.\textsuperscript{170}

\textbf{4.6.3.1 THE VALIDITY OF THE CONTRACT OF EMPLOYMENT CONCLUDED BETWEEN DISCOVERY HEALTH AND LANZETTA}

In dealing with this enquiry, the court turned to the applicable legislation, the Immigration Act, with a view to determining whether the legislature intended that a contract of employment concluded by a party who was in breach of the legislation, should be regarded as invalid. The court referred in this regard to sections 38(1) and 49(3) of the Act, and pointed

\textsuperscript{169} See for example Moses v Safika Holdings (Pty) Ltd [2001] 22 ILJ 1261 (CCMA), Mthethwa v Vorna Valley Spar (1996) 7 (11) SALLR 83 (CCMA) and Dube v Classique Panelbeaters [1997] 7 BLLR 868 (IC).

\textsuperscript{170} 1487.
out that neither of these sections specifically provide that a contract of employment concluded without the necessary permit is void, and it furthermore does not make it an offence for a person who accepts or performs work without a valid permit.\footnote{171} This raises the question whether the legislature’s intention was merely to deter employers from breaching section 38, or whether it was intended that any contract of employment concluded by parties contrary to the Act, must be void.

In ascertaining the intention of the legislature, the court noted that regard must be had to section 39 of the Constitution which requires that legislation must be interpreted in a way which promotes the spirit, purport and objects of the Bill of Rights. The court referred to the case of \textit{NUMSA \& Others v Bader Bop (Pty) Ltd \& another}\footnote{172} where the Constitutional Court emphasised that if a statute is capable of interpretation in a way which does not limit fundamental rights, then that interpretation should be preferred.

The fundamental right relevant in this case, is the right to fair labour practices.\footnote{173} In examining whether the Act limits this fundamental right, the court pointed out that the Act does not penalise the conduct of any person who accepts or performs work that is not authorised, it does not explicitly proscribe contracts concluded by unauthorised workers nor does it provide that contracts are not enforceable in those circumstances.

The court went on to consider the consequences which would arise if section 38(1) did in fact render a contract of employment concluded with a foreign national not in possession of a work permit, void. An example provided is the situation which would arise where an unscrupulous employer, prepared to risk criminal sanction, employs a foreign national but refuses to pay him or her the remuneration owing or requires the worker to work long hours and denies the worker any right to annual or sick leave, in contravention of the BCEA. In such circumstances, if the submissions of Discovery Health were correct, the foreign national would have no contractual remedy and also no labour law remedy. This would effectively leave these persons, who may have no option due to their circumstances but to accept the unauthorised employment, with absolutely no recourse against their employers.\footnote{174}

\footnotesize{
\begin{itemize}
\item[\footnote{171}] 1489.
\item[\footnote{172}] (2003) 24 \textit{ILJ} 305 CC.
\item[\footnote{174}] 1491.
\end{itemize}
}
In the court’s view, if a contract in such circumstances was invalid this would not only defeat the purpose of the Act but would also defeat the primary purpose of section 23 of the Constitution which is to give effect, through labour legislation, to the right to fair labour practices. The court held further that it could not have been the intention of the legislature to render the underlying contract invalid, and accordingly the contract concluded between Discovery Health and Lanzetta was valid, and remained valid until its termination by Discovery Health. The court further confirmed that Lanzetta was in fact an ‘employee’ as defined in the LRA.

The court went on to consider the effect of such a conclusion and whether the CCMA would, by assuming jurisdiction in a dispute referred by an illegal worker, be condoning illegality? In the court’s view, by assuming jurisdiction the CCMA would in fact expose any illegality that exists and thereby deter it as employer’s would be less likely to employ illegal workers who are not in possession of work permits if these workers had rights of recourse in terms of our labour legislation.

Whilst the abovementioned conclusion could have resulted in the Review Application being dismissed and the matter being referred back to the CCMA, the court nevertheless moved on to consider the second part of the enquiry. This was due to the fact that the Commissioner’s ruling was based on the concept of an employment relationship, and it was thus necessary to determine whether the basis of the Commissioner’s finding was correct. The court assumed, for the purpose of the second enquiry only, that the contract concluded between the parties was invalid.

4.6.3.2 IS THE DEFINITION OF “EMPLOYEE” IN SECTION 213 OF THE LRA NECESSARILY UNDERPINNED BY A VALID EMPLOYMENT CONTRACT?

The court commenced this enquiry by considering section 213 and highlighting that this section does not refer directly to a contract of employment. In interpreting this section, the court noted that the Constitution provides that “everyone” has the right to fair labour

175 Ibid.
176 1492.
practices, and given that statutory provisions must be interpreted to give effect to the Constitution, the definition of “employee” must be interpreted in light of the more expansive term “everyone”. The court held that whilst “everyone” should however not be interpreted literally, and that the scope of the right should instead be determined in light of the reference to “fair labour practices”, which arise from “the relationship (own emphasis) between workers, employers and their respective organisations”.

In dealing with the term ‘worker’ the court referred to the case of South African National Defence Union v Minister of Defence where the Defence Force argued that in the absence of a contract of employment, the members of the military were not “workers” for the purpose of section 23 of the Constitution. In this case it was however held that the reference to worker in section 23 should be interpreted so as to include members of the military, even though their relationship with the defence force is not an ordinary employment relationship.

The court summarised the position, in light of the abovementioned case, as being that the protection guaranteed in section 23 of the Constitution is not dependant on a contract of employment, and that protection extends to other contracts, relationships and arrangements in terms of which a person works or provides personal services to another.

As the Constitution requires that international law be considered when interpreting legislation, the court referred to various ILO conventions which apply to the present case. The court referred in particular to the International Convention on the Rights of all Migrant Workers and Members of their Families, which, although not ratified by South Africa, is a significant statement of international norms in respect of the rights of migrant workers. This Convention extends rights to migrant workers and their families who enter or reside in the host country illegally and whilst aiming to discourge irregular migration, it also acknowledges the vulnerable position of these illegal immigrants and aims to protect their fundamental rights. The court also referred to ILO Convention 143 which has as its primary purpose the protection of the fundamental rights of migrants, including those employed illegally. Accordingly it was held that the LRA should be interpreted in a manner that recognises the

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178 1493.
179 1999 (4) SA 469 (CC).
180 1494.
purposes of these Conventions.

The court concluded, based on the provisions of section 23(1), the relevant international standards and other courts’ interpretations of the definition of “employee”, that the definition of “employee” is not necessarily rooted in a contract of employment.

4.6.3.3 THE COURT’S CONCLUSION

The court held that it was not necessary for the commissioner, in dealing with the submission that Lanzetta’s contract of employment was invalid, to consider whether Lanzetta was a party to an “employment relationship”. All the commissioner had to consider was whether Lanzetta worked for Discovery Health and whether he received or was entitled to receive remuneration, i.e. the commissioner should have merely applied the statutory definition of employee, as the fact that Lanzetta’s contract was contractually invalid because Discovery Health employed him in breach of section 38(1) of the Act, did not automatically disqualify him from being an employee.

Accordingly it was held that it was not necessary for the Commissioner to resort to a construction that transcends the employment contract as a whole in order to deal with the consequences of the alleged invalidity, and that the invalidity argument is better dealt with on the basis that the statutory definition of employee extends beyond an employment contract and therefore the contractual requirements are not relevant to the application of the definition.

In arriving at its conclusion however, the court noted that the concept of an “employment relationship” is nevertheless an important one and is useful in certain instances, particularly dealing with disguised employment. However it was held that this is not the case here, and all

181 1496.
182 Ibid.
183 1497.
that is at issue here is whether invalidity in a contract of employment, disqualifies a person who performs work in terms of that contract, from claiming to be a statutory “employee”\textsuperscript{184}.

The court’s findings can be summarised up as follows:

“(a) The contract of employment concluded by Discovery Health and Lanzetta was not invalid, despite the fact that Lanzetta did not have a valid work permit to work for Discovery Health. For this reason, Lanzetta was an ‘employee’ as defined in s 213 of the LRA and entitled to refer the dispute concerning his unfair dismissal to the CCMA.

(b) Even if the contract concluded between Discovery Health and Lanzetta was invalid only because Discovery Health was not permitted to employ him under s 38(1) of the Immigration Act, Lanzetta was nonetheless an ‘employee’ as defined by s 213 of the LRA because that definition is not dependent on a valid and enforceable contract of employment.”\textsuperscript{185}

The court accordingly concluded that the Commissioner’s decision, whilst not entirely based on the same reasoning as that of the court’s, was one which a reasonable decision-maker could have reached and should therefore stand. The application to review and set aside the commissioner’s ruling was therefore dismissed, and due to the review relating only to the jurisdictional ruling, the matter was referred back to the CCMA to determine whether the dismissal of Lanzetta was fair.

The court makes an important statement in its judgment, which is that there may be a valid and significant distinction between work that is illegal, and work that is alleged to be illegally performed\textsuperscript{186}. Whilst this case is an example of the latter, an example of the former is the case of Kylie v CCMA and Others\textsuperscript{187} which is dealt with in the chapter that follows.

4.7 CONCLUSION

A common reaction to the question of whether illegal immigrants in South Africa should be afforded rights in terms of our labour legislation, is that these illegal immigrants are taking up jobs in a country where countless numbers of its own people are jobless.

\textsuperscript{184} 1497.
\textsuperscript{185} 1498.
\textsuperscript{186} Ibid.
However in my view, by not affording labour rights to illegal immigrants, more employers will prefer to employ an illegal immigrant for lower wages, longer working hours and the option of dismissal whenever the employer so desires. Take the following example:

“Ms F was in South Africa illegally. She could not speak English and was not able to read and write. She was also unable to afford the fees associated with applying for the necessary permits, even if she knew how to go about applying for them. Shortly after her arrival in South Africa Ms F was employed as a domestic worker. She was expected to be on call 24 hours a day and when she objected to that one day she was told to leave her job and the employer’s home immediately.”

In the above-mentioned scenario, the position in South African law prior to the Discovery Health case, would have precluded Ms F from pursuing an unfair dismissal dispute.

The Discovery Health case is controversial and has brought about mixed opinions in respect of its finding, while some are in agreement with the finding others are of the view that it is a finding which cannot reasonably be sustained. Be that as it may, the position in South Africa subsequent to the Discovery Health case is that an illegal immigrant who concludes an employment contract and is employed contrary to the Immigration Act, is nevertheless an employee as defined in the LRA and the contract of employment is not void ab initio. The illegal immigrant accordingly has the necessary locus standi to approach the CCMA to pursue an unfair dismissal dispute and to pursue the processes and remedies envisaged in the LRA.

The labour rights of illegal immigrants may develop further through cases over time, as the Discovery Health case has certainly extended the debate and opened the door for illegal workers to pursue their unfair dismissal claims.

189 See the views of Craig Bosch in “Can Unauthorized Workers be regarded as Employees for the Purposes of the Labour Relations Act?” (2006) 27 ILJ 1342.
CHAPTER 5
THE LABOUR RIGHTS OF SEX WORKERS IN SOUTH AFRICA

5.1 INTRODUCTION

It is a well-known cliché that prostitution is the oldest profession in the world, and whilst this may not necessarily be correct, one can safely accept that ever since the existence of money, goods or services which could be bartered, people have been bartering them for sex.

Prostitution has existed throughout our history and continues to exist today, whether legally or illegally, in almost every country. In South African law, prostitution is illegal and is currently dealt with in terms of the Sexual Offences Act\(^{192}\) (hereinafter referred to as “the Act”) and the Criminal Law (Sexual Offences and Related Matters) Amendment Act,\(^{193}\) although other legislation, such as the Aliens Control Act\(^ {194}\) also contains provisions that are peripherally relevant to prostitution. Municipal by-laws\(^ {195}\) also play a role in the legal control of prostitution. These are usually in the form of measures relating to business licenses for brothels or in the form of either general or “prostitution-specific” provisions.\(^ {196}\)

Despite legislation prohibiting prostitution and resultant imprisonment and/or fines upon conviction, prostitution – which involves commercial transactions between clients and sex workers or agencies, whereby sexual services are exchanged for cash – remains a common practice.

The purpose of this chapter is to examine the employment relationship between sex workers and these agencies, most commonly known as brothels, massage parlours or escort agencies, and to determine whether, or to what extent if any, labour rights are afforded to these workers.

\(^{192}\) 23 of 1957.
\(^{193}\) 32 of 2007.
\(^{194}\) 96 of 1991.
\(^{195}\) For example regulation 5 of the Western Cape By-Laws PN 710 of 24 November 1950 provides that “no person shall...cause an obstruction or a nuisance to pedestrian or vehicular traffic on a street, by loitering or congregating in or upon such street or sitting or lying down on any stoep adjoining such street...” and under the title “nuisances”, regulation 41 provides that “no person shall...(h) in or near a street loiter or solicit or importune any other person for the purpose of prostitution, immorality or mendicancy...”.
In doing so reference will be made to the purpose and extent of the Act and the effect which its prohibition of prostitution may have on the labour rights of these sex workers.

The question of whether or not sex workers have access to labour rights, depends primarily on whether they can be considered to be employees for the purposes of the LRA, given that the illegality of their work effectively renders their employment contracts void and unenforceable.

This question was considered by both the Labour Court (hereinafter referred to as “LC”) and the Labour Appeal Court (hereinafter referred to as “LAC”) in the recent case of Kylie v CCMA and Others,\(^{197}\) where a sex worker referred an unfair dismissal dispute to the CCMA after being dismissed from her employment at a brothel in Cape Town.

This judgment, which will be considered in detail in this chapter, is of considerable importance to sex workers in South Africa and indicates a departure from the common law principle that courts will not come to the assistance of those who contract illegally.

5.2 NATURE AND EXTENT OF THE EMPLOYMENT OF SEX WORKERS IN SOUTH AFRICA

A distinction can be drawn between indoor-based sex workers and outdoor-based sex workers, the latter consisting of those who work independently and solicit outside on the streets, and the former being those sex workers who are employed by agencies or brothels.\(^{198}\) Given that this discussion revolves around the employment relationship of sex workers, the focus will be on indoor-based sex workers who are “employed” by brothels or agencies.

A recent research project conducted by the Sex Worker Education and Advocacy Taskforce (SWEAT) in Cape Town, the focus of which was to gain a better understanding of trafficking into the sex work industry, provides an indication of the extent of the sex industry in South Africa. This research project identified a total of 103 brothels in the 54km radius of the centre


of Cape Town, of which 67 were residential agencies and 34 were massage parlours or clubs. A total of 964 individuals were identified as working in the indoor industry, 70% of which were employed at brothels. The research project also confirmed, through the use of surveys, that the predominant reason why individuals, most of which are women, become involved in this industry is the need for easy income with the benefit of no contractual obligations.

The relationship between the sex workers and brothels appear to be a formal employer-employee relationship, however these workers are essentially employed on what can be described as “a free-lance basis”. The sex workers however do not enjoy any of the benefits associated with freelancing.

The benefits of having no contractual or labour law obligations are enjoyed mainly, if not exclusively, by the brothel or agency owners as they determine the rules, the fees to be charged to clients and the fees their “employees” are required to pay the agency. In most brothels or agencies the sex worker is required to pay the agency a percentage, usually between 40% and 60%, of their fees as well a weekly fee for advertisements that are placed in the local newspapers, which are often more than the actual cost thereof to the agency. The fees required by the agency are set and do not depend on the number of clients a sex worker sees and therefore sex workers are often left owing money to their employers rather than earning a salary.

Whilst those sex workers who work independently have the benefits of making their own bookings, choosing their own hours and not being exposed to fines by brothel owners, they do not have the same level of protection as those working in established agencies or brothels. For this reason many sex workers choose to be ‘employed’ rather than to work on their own. In some instances owners of brothels merely let their premises to sex workers on an hourly

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199 Preliminary Research Findings of Relevance to the Draft Legislation to Combat Trafficking in Persons and Legislation Pertaining to Adult Prostitution 11.
200 Ibid.
201 15.
202 Ibid.
203 16.
204 17.
205 Sexual Offences and Adult Prostitution Discussion Paper 42.
basis, who then work as independent contractors as opposed to actually being employed by these establishments.

The working conditions of sex workers vary, however most are inflexible and exploitative. Those sex workers who live on the agency premises are required to work long hours without additional compensation, and those not living on the premises work shifts of 10 hours on average. The income of sex workers differs, but was found in the SWEAT research project referred to above, to be on average R339 per hour, with the highest fee being R750 per hour, and the lowest being R170 per hour.

Given that prostitution is illegal and prohibited, sex workers do not have access to protective measures contained in labour legislation such as the LRA, Basic Conditions of Employment Act (hereinafter referred to as the “BCEA”) or the Occupational Health and Safety Act.

The employers in this industry are therefore under no obligation to afford these workers any of the basic conditions of employment such as leave and overtime, and working hours remain excessive and unregulated.

5.3 THE SEXUAL OFFENCES ACT

Prostitution is prohibited by the Sexual Offences Act (hereinafter referred to as “the Act”). This Act, previously called the Immorality Act, was enacted in 1957. The Act initially only prohibited brothel keeping, residing in a brothel and the sharing in any profits thereof, until 1988 when the actual transaction of “unlawful carnal intercourse for reward” was made a criminal offence. The Act now penalises inter alia prostitution, the keeping of brothels, the procurement of women as prostitutes, soliciting by prostitutes, and living off the earnings of prostitution.

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206 Ibid.
207 Preliminary Research Findings of Relevance to the Draft Legislation to Combat Trafficking in Persons and Legislation Pertaining to Adult Prostitution 18.
208 75 of 1997.
209 85 of 1993.
210 Sexual Offences and Adult Prostitution Discussion Paper 45.
211 23 of 1957.
5.3.1 CONTENT AND PURPOSE OF THE ACT

The primary prohibition of prostitution is contained in section 20(1A) of the Act, which provides that any person 18 years or older who has unlawful carnal intercourse, or commits an act of indecency, with any other person for reward; or in public commits any act of indecency with another person, shall be guilty of an offence. The penalty for the contravention of this section is imprisonment for a period not exceeding three years, with or without a fine not exceeding R6 000 in addition to such imprisonment. The same penalty is also extended to persons who knowingly live wholly or in part on the earnings of prostitution.

Section 2 of the Act provides that any person who keeps a brothel shall be guilty of an offence. The Act defines a brothel as including “any house or place kept or used for purposes of prostitution or for persons to visit for the purpose of having unlawful carnal intercourse or for any other lewd or indecent purpose”. The concept of a “place” is further defined as including “any field, enclosure, space, vehicle, or boat or any part thereof”. Section 3 of the Act extends the concept of brothel “keeping” by providing the following list of persons who will be deemed to be keeping a brothel:

“(a) any person who resides in a brothel unless he or she proves that he or she was ignorant of the character of the house or place;

(b) any person who manages or assists in the management of any brothel;

(c) any person who knowingly receives the whole or any share of any moneys taken in a brothel;

(d) any person who, being the tenant or occupier of any house or place, knowingly permits the same to be used as a brothel;

(e) any person who, being the owner of any house or place, lets the same, or allows the same to be let, or to continue to be let, with the knowledge that such house or place is to be kept or used or is being kept or used as a brothel;

(f) any person found in a brothel who refuses to disclose the name and identity of the keeper or manager thereof;

(g) any person whose spouse keeps or resides in or manages or assists in the management of a brothel unless such person proves that he or she was ignorant thereof or that he or she

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213 S 20(1A).
214 S 22(a).
215 S 20(1)(a).
216 S 1.
lives apart from the said spouse and did not receive the whole or any share of the moneys taken therein.”

The Act also makes provision for the “procuring” of prostitutes, which in the context of the Act refers to the recruitment of persons for the purpose of working as prostitutes. Section 22 of the Act provides in this regard that the procurement of any women for sexual intercourse, for a brothel, to become a common prostitute, to become an inmate of a brothel or by stupefaction, will constitute a criminal offence.

Section 12A of the Act provides that Any person who, with intent or while he reasonably ought to have foreseen the possibility that any person who is 18 years or older, may have unlawful carnal intercourse, or commit an act of indecency, with any other person for reward; performs for reward any act which is calculated to enable such other person to communicate with any such person who is 18 years or older, shall be guilty of an offence. This provision appears to have been enacted by the legislature with the aim of criminalising the activities of “escort agencies”, which are establishments that introduce clients to an escort who will accompany the client for an agreed period.

5.3.2 THE INTERPRETATION OF THE ACT

The proper interpretation of the Act, in particular section 20(1A), was considered by the Constitutional Court (hereinafter referred to as “CC”) in the case of S v Jordan where the CC was required to determine whether the High Court was correct in concluding inter alia that the provision was unconstitutional, given that it criminalised only the conduct of prostitute and not that of the client. In doing so, the CC had to consider whether there is a constitutionally compatible interpretation of the section, which interpretation should not be unduly strained, but must be one which the provision is reasonably capable of bearing.

The CC noted that it has generally been accepted in our law that section 20(1A) criminalises only the conduct of the prostitute and not that of the client, and not a single case of the
prosecution of a customer since 1988 (when section 20(1A) was introduced into the statute) was brought to the courts attention in this matter, nor did the state attempt to challenge the assertion that in practice only the prostitutes were charged in terms of the section.\textsuperscript{222}

The CC considered what range of conduct falls within the scope of section 20(1A), as the High Court had held that its terms were too wide. It was pointed out that the question to be determined is whether the phrase “unlawful sexual intercourse or indecent act for reward” is capable of being read to include only activity ordinarily understood as prostitution.\textsuperscript{223}

The CC concluded that the section is reasonably capable of a restrictive interpretation and that the proper interpretation of section 20(1A) is that the provision criminalises the conduct of prostitutes but not that of customers.\textsuperscript{224} This was found to be unconstitutional by O’Regan J and Sachs J in their minority judgment.

Subsequent to the finding of the CC in the above-mentioned case, the Sexual Offences Amendment Act\textsuperscript{225} was enacted, which makes provision for the commission of an offence by the clients of prostitutes. Section 11 thereof criminalises the actions of clients of adult prostitutes by providing that a person who engages the services of a person 18 years or older for financial or other reward, favour or compensation; for the purpose of engaging in a sexual act, irrespective of whether the act is committed or not; or by committing a sexual act with the person, is guilty of the offence of engaging the sexual services of a person 18 years or older.

5.4 \textit{KYLIE v CCMA \& OTHERS}

In the recent case of \textit{Kylie v CCMA \& Others},\textsuperscript{226} a sex worker referred an unfair dismissal dispute to the CCMA following her dismissal from a massage parlour in Cape Town. The arbitrating commissioner ruled that the CCMA lacked jurisdiction to arbitrate as the applicant's contract of employment was for an unlawful purpose and was accordingly invalid.

\textsuperscript{222} 42.
\textsuperscript{223} 48.
\textsuperscript{224} 50.
\textsuperscript{225} 32 of 2007.
Kylie subsequently approached the Labour Court to review the commissioner’s decision on the basis that the commissioner had committed a legal error in excluding workers who did not have a valid and enforceable contract, from the ambit of the LRA. The Review Application was unsuccessful, and instead of reviewing the jurisdictional ruling, the LC substituted the commissioner’s ruling with a ruling in terms of which Kylie’s claim for 12 months’ compensation was refused.

Kylie did not accept this fate and referred the matter to the LAC, which upheld her appeal and replaced the LC’s order with an order setting aside the jurisdictional ruling of the CCMA, and a finding that the CCMA has the necessary jurisdiction to determine the dispute between the parties.

What follows is an analysis of each of the three judgments and the reasoning applied by the courts in reaching a somewhat controversial conclusion.

5.4.1 THE FACTUAL BACKGROUND

The applicant was employed as a sex worker and masseuse at Brigittes, a massage parlour in Cape Town belonging to the third respondent. Due to the criminal nature of her work and the social stigma attached thereto, the applicant sought and was granted permission to keep her identity anonymous, and is therefore known only as “Kylie”.227

It is common cause that some, if not most, of Kylie’s work contravened the Act, in that she resided in a brothel and committed various sexual and/or indecent acts with people for reward.228 Prior to her dismissal Kylie was paid a salary by the third respondent and worked 14 hours a day, seven days a week. She lived on the premises and was subject to a strict system of rules and fines. Her dismissal was as a result of an alleged contravention of this system.229

227 “Kylie” and Van Zyl t/a Brigittes (2007) 28 ILJ 470 (CCMA) 471.
229 Ibid.
Kylie alleged that her dismissal was unfair, and claims that sex workers should be treated fairly and be protected by and afforded the same constitutional and statutory rights available to other workers. Kylie accordingly referred an unfair dismissal dispute to the CCMA in terms of the LRA.

5.4.2 THE CCMA’S JURISDICTIONAL RULING

The preliminary issue of whether the CCMA has jurisdiction to arbitrate the dispute, given the criminal nature of the work, was raised by the commissioner *mero motu* upon discovering the nature of the employment relationship between the parties. The parties were given an opportunity to file written arguments on this issue, however the respondent decided not to file submissions and that it would abide by the decision of the commissioner.230

The common cause facts before the arbitrator were that the applicant was employed as a masseuse and/or sex worker, and that she assisted the respondent in conducting a massage parlour. It was also common cause that most, if not all, of the applicant’s duties involved acts prohibited by the Act.231

In support of the applicant’s argument that the CCMA does have the necessary jurisdiction to arbitrate the dispute, reference was made to section 23 of the Constitution, which affords “everyone” the right to fair labour practices.232 It was argued that sex workers fall within the definition of “everyone” and “every worker” as contained in section 23 and that they are not excluded by any of the categories referred to in section 2 of the LRA. The applicant argued further that it is the CCMA’s function to resolve labour disputes and not to combat crime, nor is it a function of the LRA to implement or monitor criminal behaviour and the granting of labour rights to sex workers does not undermine the purpose of criminal law.233 Given that the LRA provides that in the event of conflict between the LRA and provisions of any other law the LRA must prevail, the applicant submitted that accordingly the LRA must prevail over the Sexual Offences Act.

231 Ibid.
232 474.
233 475.
The applicant submitted that the premise that a legally enforceable contract under the common law is required in order for a person to fall within the statutory definition of an employee, is wrong. Instead one should rely on section 213 of the LRA which defines an employee, as well as the presumption provided for in section 200A.\textsuperscript{234}

The commissioner, in analysing the applicants argument, considered firstly the submission that in order to fall within the protection of the LRA a person must be an employee in terms of section 213 or section 200A, and that no legally enforceable contract of employment is required.\textsuperscript{235} The commissioner noted that the nature of the applicant’s work falls either with the definition of unlawful carnal intercourse or indecent acts, as contained in the Act, and therefore the nature of the work which the respondent employed the applicant to do, is illegal. He held that, in light of the fact that the CCMA is an administrative body created by statute, it must merely apply the current law without commenting on the appropriateness thereof, and in this particular situation without imposing its own morality in deciding whether the Act is out of sync with the values of modern society.\textsuperscript{236}

The commissioner considered the cases submitted by the applicant as examples of instances where the CCMA had assumed jurisdiction in matters where employees had committed acts of illegality, and noted that all these cases can be differentiated from this case in that those employees were not employed to undertake illegal work, but rather committed an illegal act in the course of their legal duties associated with their employment.\textsuperscript{237} In other words, their contract of employment was legal and enforceable, which is unlike the current case. The commissioner in this regard held that the basis of the CCMA’s jurisdiction is that there must be a legally enforceable contract.\textsuperscript{238}

The commissioner turned to the applicant’s argument that excluding sex workers from the ambit of the LRA would amount to making a policy decision on behalf of the legislature, and held that this is not the case. In his view the contrary was true - if the CCMA were to resolve this dispute given the common law on the validity of illegal contracts and the fact that the applicant was employed to perform illegal work, it would then be making policy decisions for

\textsuperscript{234} Ibid.
\textsuperscript{235} 476.
\textsuperscript{236} 479.
\textsuperscript{237} 479.
\textsuperscript{238} 480.
the legislature. Furthermore, the commissioner held that if the CCMA were to assume jurisdiction, it would be doing so contrary to two principles of statutory interpretation, namely that legislation does not intend to change the existing law more than necessary, and secondly that a statute must be construed in conformity with the common law rather than against it, except where the statute is plainly intended to alter the course of the common law. The commissioner held that in his view the LRA did not intend to change the common law relating to illegal and unenforceable employment relationships.

The commissioner considered the applicant’s argument that although sex work is criminalized, it continues to exist and operate openly and is tolerated by society. The applicant argued that this is apparent from the numerous advertisements placed in newspapers, the fact that rarely any arrests of prostitutes take place other than occasional “loitering” charges in terms of local by-laws, and licenses are regularly being granted to commercial sex work establishments. In light of this, the applicant argued that it is neither necessary, desirable nor legally permissible for the CCMA to exclude sex workers from the protection of the LRA.

The commissioner held in this regard that, even though it appears that the law may not be in line with the morality or prevailing views of society, the CCMA does not have the power to change the law, and can only act within its powers as an administrative body.

The commissioner accordingly ruled that the CCMA does not have jurisdiction to arbitrate this unfair dismissal dispute.

5.4.3 THE LABOUR COURT JUDGMENT

The applicant approached the Labour Court to review the CCMA’s ruling on the basis that the commissioner committed a legal error in excluding workers who did not have a valid and enforceable contract, from the ambit of the LRA, as the LRA defines employees to include anyone “who works for another person” and accordingly the Act applies to all employment relationships.
relationships irrespective of whether they are underpinned by enforceable contracts or not.\textsuperscript{243} The crux of the applicant’s argument was that both the Constitution and the LRA, properly interpreted, extend labour rights to sex workers despite the illegality of their work, and that whilst a sex worker is an employee under the LRA, an arbitrator faced with an unfair dismissal of a sex worker may nevertheless for public policy reasons decline to reinstate her and order compensation instead.\textsuperscript{244}

The applicant argued that the right to fair labour practices contained in section 23(1) of the Constitution applies to everyone and that the LRA should be interpreted in light of this interpretation. Therefore it follows according to the applicant that the LRA should similarly apply to all workers, including sex workers.\textsuperscript{245}

The applicant challenged the commissioner’s finding that section 213 of the LRA includes only those employees who have a valid and enforceable contract and referred in this regard to the LAC’s decision in \textit{Denel v Gerber}\textsuperscript{246} where it was held that a court should not have regard to labels but to the \textit{realities of the relationship} (own emphasis) between the parties.\textsuperscript{247}

Cheadle AJ in his judgment criticises the commissioner and applicant for hinging their argument on the definition of employee, which in his view is to focus on the wrong issue. Cheadle AJ explains that the correct approach is to consider the question whether as a matter of public policy courts should sanction or encourage illegal conduct in the context of statutory and constitutional rights.\textsuperscript{248} He notes that it may even be that a non-contractual employment relationship falls within the definition and points out that the Labour Court had already ruled in the \textit{Discovery Health v CCMA & Others}\textsuperscript{249} case that the LRA applies to employees irrespective of the existence of a valid contract of employment.\textsuperscript{250}

\textsuperscript{243} \textit{“Kylie” v Commission for Conciliation, Mediation & Arbitration & Others} (2008) 29 \textit{ILJ} 1918 (LC) 1925.

\textsuperscript{244} \textit{Ibid.}

\textsuperscript{245} \textit{Ibid.}

\textsuperscript{246} (2005) 26 \textit{ILJ} 1256 (LAC).

\textsuperscript{247} 1926.

\textsuperscript{248} 1927.

\textsuperscript{249} (2008) 29 \textit{ILJ} 1480 (LC).

\textsuperscript{250} 1927.
The court noted that there can be little doubt that an employment relationship existed between the applicant and the respondent, and pointed out that it is not the lack of a valid contract that is at stake but the reasons for its invalidity.251

In dealing with the public policy issues raised by this case, the applicant raised two reasons as to why the common law principle that courts will not lend their aid to the enforcement of illegal contracts, should not be applied in respect of sex workers.252 Firstly, it was argued that the principle of public policy only arises if the court has a discretion and in the present case, given the interpretation of section 23 and the definition of employee section 23, no such discretion exists.253 Secondly the applicant argued that there exist countervailing considerations of public policy, namely the criminalisation of prostitution on the one hand and the Constitutional right to fair labour practices on the other hand which is given effect to through the provisions of the LRA.254 The applicant argued that there is no reason to subordinate one statute to the other as they operate in different spheres, the one aiming to combat prostitution and the other aiming to promote social justice by protecting vulnerable employees from exploitation. In the alternative, the applicant argues that even if the court were to choose between the two statutes, the LRA should prevail in light of section 210 thereof and given that the LRA gives effect to the Constitutional right to fair labour practices.255

The court rejected the applicants arguments and held that there is a fundamental principle of public policy that courts should not sanction or encourage illegal activity, and that a thing done contrary to the direct prohibition of the law is void and of no effect. In support of this the court briefly outlined the manner in which these principles have been applied by the courts generally and in respect of prostitution specifically.256 The court referred firstly to the ex turpi causa rule (the prohibition of the enforcement of immoral or illegal contracts) and noted that a contract is illegal if it is against public policy or morality and given that commercial sex is regarded as immoral at common law, any agreement linked thereto will be void and

251 Ibid.
252 1926.
253 Ibid.
254 1927.
255 Ibid.
256 1929.
unenforceable. Secondly the court referred to the *par delictum* rule which prevents the ability to claim the recovery of performance made under an illegal contract.

In applying the abovementioned principles to the statutory claims not to be unfairly dismissed, the court held that it is not simply a question of balancing the LRA and the Act in order to determine which one trumps the other, and that the two cannot be considered separately if the legal consequences of the contravention extends beyond the confines of the statute.257

In applying the aforementioned common law principles to the Act the court held that the question is whether the prohibition was intended to deny statutory remedies based on such transactions. In answering this question the court highlighted that the Act seeks to address the social ills associated with commercial sex, such as violent crimes, exploitation and trafficking, and that outlawing commercial sex is an important constitutional principle. The court pointed out that the prohibitions contained in the Act are peremptory and that the legislature clearly intended that any transactions which contravene the prohibition, be rendered unenforceable and void.258 The court noted that the legislature did not expressly undo the common law’s approach to prostitution and accordingly it did not see any reason to change the legality of the contracts which facilitate the prohibited activity.259 Furthermore, if the courts were to recognise the contract between a brothel keeper and a sex worker, it would be sanctioning the very situation which the legislature sought to prevent.260

The court then turned to consider the ambit of section 23 of the Constitution in order to determine whether its scope extends to sex workers and their employers. The court looked firstly at what the primary purpose of section 23 is, and held that it is to protect workers, given their vulnerability to exploitation. The court pointed out that the main object of the constitutional right, and the LRA which gives effect to section 23 thereof, is to structure employment in a way which counteracts the inequality in the bargaining of parties to an employment relationships.261

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257 1932.
258 1932.
259 1933.
261 1934.
The court referred to the case of *S v Jordan*262 where the CC pointed out that sex workers are entitled to the right to be treated equally and with dignity, and are afforded the rights in section 35 of the Constitution when being arrested and tried for criminal activity. In light of that finding by the CC, Cheadle AJ raised the question - what then is the basis for distinguishing between rights that illegal workers may assert, and those which they may not?263 Cheadle AJ expressed three guiding principles in this regard. Firstly, whether the legislature intended that the legal consequences of a contravention extend beyond the confines of the statute, secondly whether by recognizing a claim to a constitutional right the courts are sanctioning or encouraging the prohibited activity, and thirdly whether the denial of the constitutional right will undermine the right's deepest purposes.264 Cheadle AJ held that in his view the legislature’s intention was that the Act would penalise the prohibited activity and also prevent the recognition of any rights or claims arising from that activity.265

The court considered what the effect would be if the rights contained in section 23(2) and (3) were also extended to sex workers. He noted that the registration of a trade union of sex workers, which would be representing members who were actively breaking the law, would be sanctioning organised prostitution in clear contravention of the Act.266

The court also considered the effect of affording the primary remedy for an unfair dismissal, in this case, and pointed out that reinstating a person in illegal employment may effectively be ordering an employer to commit a crime.267

A comparison was drawn in the judgement between foreign workers and sex workers, both groups similarly being subject to exploitation and it was pointed out that the difference between the prohibition is that with sex workers the prohibition is aimed at the job itself which is illegal, whereas with foreign workers it is aimed at the person who does the job.268

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262 *S v Jordan and Others* 2002 (6) SA 642 (CC).
263 1936.
264 1936.
266 1937.
267 1938.
The court concluded with regards to the scope of the constitutional right to fair labour practices that this does not and will not include sex workers for as long as prostitution remains a crime.\textsuperscript{269} Having reached this conclusion, the court went further to consider whether the limitation of the right contained in section 23, in so far as it does not apply to sex workers, is reasonable and justifiable, in other words the question considered was whether the Act reasonably and justifiably prevents sex workers and brothel owners from enforcing these rights. The court considered firstly the nature of the right, which operates horizontally in that it imposes duties on employers, and secondly the importance of the purpose of the limitation which is to combat the social ills associated with prostitution, such as violence and drug abuse. The court found that the purpose of the limitation is sufficiently important to justify the limitation of the right.\textsuperscript{270} The court also took into account the relation between the limitation and its purpose, namely to discourage organised prostitution, and lastly whether there are less restrictive means to achieve the same purpose. The conclusion reached was that the limitation is justifiable.\textsuperscript{271}

Having concluded that sex workers are not entitled to the constitutional right to fair labour practices, the court turned to consider whether they were nevertheless entitled to the rights contained in the legislation giving effect to that constitutional right, namely the LRA. The court held that the wording of the definition of employee in the LRA is certainly wide enough to include workers who do not have a valid contract of employment, but held that that does not mean that the right not to be unfairly dismissed applies to those without a valid contract of employment.\textsuperscript{272} The court pointed out that the definition of dismissal in section 186(1) of the LRA depends on the existence of a valid contract of employment, and that any other reading is prevented both by the rule of law and by the fact that there is no constitutional imperative to interpret the section to include illegal employment.\textsuperscript{273}

The court also considered the importance of the effect of section 193 which provides that an employee whose dismissal was substantively unfair must be reinstated, unless the employee does not wish to be reinstated, the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, if it is not reasonably practicable or

\textsuperscript{269} 1939.
\textsuperscript{270} 1942.
\textsuperscript{271} \textit{Ibid.}
\textsuperscript{272} 1943.
\textsuperscript{273} \textit{Ibid.}
Lastly if the dismissal is unfair only because the employer did not follow a fair procedure. It would therefore in the present case be difficult not to reinstate the employee; however by reinstating the sex worker the court would effectively be requiring the employer to break the law.

In light of the reasoning set out above, the court dismissed the applicant’s Review Application and held that the commissioner should in fact have ruled that the CCMA cannot grant the relief sought by the applicant because by doing so the CCMA would have been sanctioning or encouraging prohibited commercial sex. Accordingly the LC substituted the commissioner’s jurisdictional ruling with a ruling that the applicant’s claim for 12 months’ compensation is refused.

5.4.4 THE LABOUR APPEAL COURT JUDGMENT

Kylie subsequently took her dispute on appeal to the Labour Appeal Court. In evaluating the court a quo’s judgment, Davis JA summarised the propositions upon which Cheadle AJ had based his finding, as follows:

1. There is a common-law principle that courts ought not to sanction or encourage illegal activity.
2. This principle is now incorporated within the Constitution, entrenched as an element of the rule of law, and set out in section 1 of the Constitution.
3. As a constitutional imperative, the statutory rights are trumped which ‘renders a sex worker’s claim to a statutory right to fair dismissal and the LRA unenforceable’.

The appellant argued that the court a quo had erred in starting with a discussion of public policy and that correct approach was to commence with the Constitution, in particular to ask the question whether the appellant enjoyed constitutional rights in general and in particular those rights set out in section 23. If the answer is in the appellants favour then the next step would be to consider the issues relating to the appropriate remedy, at which stage public

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274 S 193(2).
275 1944.
276 Ibid.
policy issues would become applicable. The question of the application of the Constitution was thus the starting-point for the appellant’s argument.

In considering the scope of section 23 of the Constitution, Davis JA noted that the CC has consistently held that the use of the word “everyone” indicates an extremely broad approach to the scope of the rights guaranteed in the Constitution. In this regard reference was made to the case of Khosa v Minister of Social Development where it was held that “The word ‘everyone’ is a term of general import and unrestricted meaning. It means what it conveys. Once the state puts in place a social welfare system, everyone has a right to have access to that system” and S v Makwanyane where the CC held that “the right to life and dignity vests in every person, including criminals convicted of vile crimes”. Reference was also made to the minority judgment in S v Jordan where the following was observed by O’Regan and Sachs JJ with regards to sex workers:

“The very character of the work they undertake devalues the respect that the Constitution regards as inherent in the human body. This is not to say that as prostitutes they are stripped of the right to be treated with respect by law enforcement officers. All arrested and accused persons must be treated with dignity by the police. But any invasion of dignity, going beyond that ordinarily implied by an arrest or charge that occurs in the course of arrest or incarceration cannot be attributed to s 20(1A) (a) but rather to the manner in which it is being enforced. The remedy is not to strike down the law but to require that it be applied in a constitutional manner. Neither are prostitutes stripped of the right to be treated with dignity by their customers. The fact that a client pays for sexual services does not afford the client unlimited licence to infringe the dignity of the prostitute.”

Davis JA held the abovementioned cases support the appellant’s argument that the illegal activity of a sex worker does not per se prevent the latter from enjoying a range of constitutional rights.

In turning to the question of whether section 23 affords protection to a sex worker, Davis JA referred to NEHAWU v UCT where the Constitutional Court emphasized that the focus of section 23(1) of the Constitution was on the “relationship between the worker and the

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278 1606.
279 2004 (6) SA 505 (CC).
280 1995 (3) SA 391 (CC).
281 2002 (6) SA 642 (CC).
282 1607.
283 Ibid.
employer and the continuation of that relationship on terms that are fair to both”. Similarly in *SANDU v Minister of Defence & another* 285 it was held that even if a person is not employed under a contract of employment, that does not deny the “employee” all constitutional protection. This conclusion is reached despite the fact that they may not be employees in the full contractual sense of the word but because their employment “in many respects mirrors those of people employed under a contract of employment”. 286

Davis JA referred further to a decision by the LAC in *State Information Technology Agency (Pty) Ltd v CCMA* 287 and noted that it, similarly to the to the submissions by the appellant, held that the employment relationship should be approached on the basis of the substance of the arrangements between the parties, as opposed to the legal form it may be in.

Davis JA held that given that sex workers cannot be stripped of the right to be treated with dignity by their clients, it must follow that, in their other relationships, particularly in their employment relationships, the same protection should be afforded. Thereafter once it is recognized that they must be treated with dignity by their employers, section 23 of the Constitution which centres on the protection of the dignity of those in an employment relationship, should also be applicable. 288 Davis JA concluded on this point that in his view the appellant is entitled to the right to fair labour practices as contained in section 23 of the Constitution. 289

Having decided that the appellant is entitled to the right contained in section 23, Davis JA turned to consider the question of relief in light of the illegality of the appellant’s contract of employment. It was noted that generally when a contract’s conclusion, performance or object is expressly or impliedly prohibited by legislation, such a contract will be void. 290 Although the courts have accepted and applied this rule to an extent that courts will not assist persons in enforcing illegal contracts, the courts have also acknowledged that they have a discretion to relax this so called *par delictum* rule, as was held in *Jajbhay v Cassim* 291 in circumstances

286 1608.
288 1608.
289 1609.
290 1610.
291 1939 AD 537.
where it was necessary “to prevent injustice or to satisfy the requirements of public policy”. Davis JA proceeded to consider the key question in light of this discretion, namely what discretion the courts have when determining a remedy for the alleged unfair dismissal of a sex worker. He held that the appellant was correct in its contention that even if there was no valid contract between the parties, there was an employment relationship in terms of which the appellant fell within the scope of the LRA. The next question that flows therefrom is accordingly whether a court could provide some remedy to a party to an illegal employment contract, if the party was able to prove an unfair dismissal within the framework of the unfair labour practice jurisprudence guaranteed in terms of section 23(1) of the Constitution and contained in the LRA. Davis JA finds that the criminalization of prostitution does not necessarily deny a sex worker the protection of the Constitution and, in particular section 23(1) thereof, and by extension its legislative implementation in the form of the LRA.

It was held further that in light of the purpose of the LRA which “is to advance economic development, social justice, labour peace and the democratisation of the workplace” and the finding of the CC that the right to fair labour practices was designed to ensure that the dignity of all workers should be respected and that the workplace should be predicated upon principles of social justice, fairness and respect for all, the courts in order to achieve those goals should safeguard those employees who are particularly vulnerable to exploitation. This would apply equally to sex workers who, as submitted by the appellant, are an especially vulnerable class of workers who are exposed to exploitation and abuse. The court noted in this regard that given that the appellant was subjected to practices which would ordinarily have been prohibited by the BCEA, such as working 14 hours a day, seven days a week and a strict regime of rules and fines, there was at least a prima facie case that the appellant falls within this category of vulnerable workers. In arriving at this conclusion Davis JA expressly provides in his judgment that “… when viewed within the South African context, many sex workers are particularly vulnerable and are exposed to exploitation and vicious abuse. It may be that this categorization is not applicable to all cases of sex workers ...” and “where a sex worker forms part of a vulnerable class by the nature of the work that she

292 1611.
293 Ibid.
294 S 1 LRA.
296 1612.
297 Ibid.
performs and the position that she holds and she is subject to potential exploitation, abuse and assaults on her dignity …” 298

It thus appears that Davis JA is effectively drawing a distinction between two groups of sex workers - those which are vulnerable and exposed to exploitation and abuse, and those which are not. Such an approach in my view cannot be justified and could not have been the intention of the court as given the nature of the work carried out by sex workers they would clearly form part of a vulnerable group in society. Furthermore, it would be exceedingly difficult to determine what grounds would be considered in order to determine whether a sex worker forms part of a vulnerable class or not.

In light of the abovementioned considerations, the court turned to the possible relief which could be afforded to the appellant if she is successfully proves her unfair dismissal claim. The court noted that section 193 of the LRA provides for considerable flexibility in that a court or arbitration has discretion to refuse reinstatement where it is not reasonably practicable for the employer to reinstate or re-employ the employee.299 It would clearly be against public policy to reinstate the appellant in her employ if she was successful with her unfair dismissal dispute, however at the same time the court pointed out that compensation, if regarded as a monetary equivalent for the loss of employment, may be equally inappropriate given that the nature of the services rendered by the appellant is illegal. However the court found that monetary compensation, if treated as a solatium for the loss by an employee of her right to a fair procedure, will be independent of the loss of illegal employment in this case and would therefore be a possible remedy.300

In reaching its conclusion the court emphasized that the findings of its judgment do not and cannot sanction sex work, however the fact that prostitution is illegal does not prevent the constitutional protection which may be enjoyed by someone such as appellant, if they were not a sex worker.301

298 1612.
299 1613.
300 1615.
301 1615.
The court held further that only those rights which are necessary for the implementation of the provisions of the Act are to be removed from the enjoyment of appellant, but that her dignity is not to be exploited or abused and the constitutional protection must be available to her as it would to any person whose dignity is attacked unfairly.\(^\text{302}\)

The court held further that when it comes to deciding the appropriate remedy, each case will have to be decided in light of its facts and that not all persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA.\(^\text{303}\) The court turned to consider the implication which a positive finding for the appellant would have on the organizational rights of sex workers, as was raised by the court \textit{a quo}. It held in this regard that, even if sex workers could form or join a trade union, they would by virtue of their unlawful activities, be unable to engage in collective bargaining or assert their right to strike.\(^\text{304}\) Furthermore, given that Registrar of Labour Relations is vested with a discretion in terms of the LRA to refuse to register a trade union, the Registrar would be entitled to refuse to register a trade union which is formed to further the commission of a crime, as would be the case if it was a trade union of sex workers.\(^\text{305}\)

Accordingly in light of the abovementioned reasoning, the LAC held that the LC had erred in its findings, and the appeal was upheld. The order of the LC was set aside and replaced with an order reviewing and setting aside the jurisdictional ruling of the CCMA, and the CCMA accordingly now has jurisdiction to hear Kylie’s unfair dismissal dispute.

5.5 \textbf{CONCLUSION}

Prostitution remains a common practice throughout South Africa, and whilst viewed as immoral by a large part of our society, it is generally tolerated. As long as there is a demand for sexual services in exchange for cash, the prostitution industry will continue to exist and sex workers will continuously be employed by brothel and agency owners who are, in the absence of applicable labour legislation, able to exploit these workers.

\(^\text{302}\) 1616.  
\(^\text{303}\) \textit{Ibid.}  
\(^\text{304}\) 1617.  
\(^\text{305}\) \textit{Ibid.}
There can be little doubt that an employment relationship exists between sex workers and brothel owners, despite the illegality of their employment contract. However, given that prostitution is illegal and prohibited, sex workers in South Africa have previously been unable to access the protective measures contained in our labour legislation. This position has now changed as a result of the recent Labour Appeal Court judgment in *Kylie v CCMA & Others*\(^{306}\) which confirmed that sex workers are entitled to the constitutional right to fair labour practices as well as the provisions of the LRA which give effect to this right.

The *Kylie* judgment has a controversial element given that it can be argued that by affording these rights to sex workers, who are effectively committing crimes on a daily basis, the courts are sanctioning or encouraging their illegal conduct and the very situation which the legislature sought to prevent. However on the other hand, by failing to afford these workers the protection of our labour legislation, are we not sanctioning the illegal conduct of their employers?

The Constitutional Court has already recognised in *S v Jordan*\(^{307}\) that sex workers are entitled to be treated with equality and dignity, as are other criminals who are also afforded the rights in section 35 of the Constitution when being arrested and tried for criminal activity. In this regard Cheadle AJ raised the following question in *Kylie*’s review application - what is the basis for distinguishing between rights that illegal workers may assert, and those which they may not?\(^{308}\) In my view there is no basis for doing so. If criminals who commit the vilest crimes are still afforded the right to dignity then there can surely not be a justifiable basis for denying a sex worker the right to fair labour practices.

However, in reaching its conclusion the Labour Appeal Court emphasized that its judgment does not and cannot sanction sex work and that those rights which are necessary for the implementation of the provisions of the Sexual Offences Act are to be removed from the enjoyment of the appellant. Furthermore, it was emphasized that when it comes to deciding the appropriate remedy, each case will have to be decided in light of its facts and that not all


\(^{307}\) 2002 (6) SA 642 (CC).

persons who are in an employment relationship which is prohibited by law will enjoy a remedy in terms of the LRA.\footnote{Ibid.}
CHAPTER 6
CONCLUSION

It has now been established that our courts no longer view the contract of employment as the primary source from which to establish the nature of the parties’ work relationship. Whilst the contract of employment continues to be an important factor in determining whether a party to a working relationship is in fact an employee, the contract of employment is by no means the deciding factor. This is in line with international law, in particular the ILO’s Recommendation 198 of 2006, which suggests that the determination of whether a worker is an employee, should be made with reference to the performance of the work and remuneration of the worker, irrespective of any contractual or other arrangement that may indicate otherwise.

This approach has brought about a significant change to the rights of illegal immigrants and sex workers who have until recently been denied access to the provisions of the LRA. In light of the judgment in the *Discovery Health* case and the *Kylie* case, the position is now that illegal immigrants and sex workers who are employed contrary to the Immigration Act and Sexual Offences Act, are nevertheless viewed as employees despite the illegality of their contract of employment. These illegal workers thus have the necessary *locus standi* to approach the CCMA to pursue an unfair dismissal dispute and to pursue the processes and remedies envisaged in the LRA.

It can accordingly be said that labour rights have now been extended to illegal workers, however this extension is qualified and as pointed out by Davis JA in the *Kylie* case, each case will have to be decided in light of its facts and not all persons who are in an employment relationship which is prohibited by law will enjoy the remedies provided for in the LRA.

There are however some difficulties which arise as a result of the conclusion reached in these two decisions.

Firstly, a commissioner who must decide an unfair dismissal dispute referred by an illegal immigrant or sex worker, is faced with the difficult task of deciding on an appropriate remedy if he finds that such a worker was in fact unfairly dismissed. Davis JA in his judgment points
out that reinstatement would clearly not be an option as this would be contrary to public policy and in direct contravention of the Immigration Act and Sexual Offences Act, however a court or arbitrator does have a discretion to refuse reinstatement where it is not reasonably practicable for an employer to re-employ the employee.\textsuperscript{310} Davis JA goes further and states that similarly, compensation for a substantively unfair dismissal, if regarded as a monetary value for the loss of employment, will also be inappropriate where the nature of services rendered by the employee are illegal.\textsuperscript{311} He however declines to express a final view on this issue and suggests that the appropriate kind of compensation would be monetary compensation for a procedurally unfair dismissal, as this kind of compensation is independent from the loss of illegal employment.

A further difficulty which arises from these two judgments which effectively have now classified workers, who are engaged in illegal work, as employees for the purposes of the LRA, is to what extent will they have access to organizational rights. Davis JA deals with this issue in his judgment and points out that even if illegal workers could form or join a trade union, they would not be able to assert any right to participate in any activities through such a trade union as it is only by way of lawful activities that employees are entitled to exercise this organizational right. Furthermore, collective agreements concluded by employers and illegal workers would clearly centre on the commission of a crime and thus be unenforceable. Collective bargaining between these two parties would therefore also not be allowed.

Effectively what these two judgments have established is that illegal workers are employees for the purposes of the LRA, however that their rights as employees are limited by virtue of the illegality of their work. These judgments therefore provide no clear guidelines for courts or arbitrators hearing future disputes between employers and illegal workers, and the judges in both these cases have been at pains to emphasize that these judgments do not sanction illegal work and that each case must be decided on its facts.

Davis JA also points out that in deciding a remedy for a person engaged in illegal employment, the tribunal or court must weigh up the principles namely the \textit{ex turpi causa} rule which prohibits enforcement of illegal contracts on the one hand, and public policy sourced

\textsuperscript{310} S 193 Labour Relations Act.
\textsuperscript{311} 1615.
in the values of the Constitution on the other hand, which, in this context, promotes a society based on freedom, equality and dignity.

Davis JA points out that cases involving employment relationships which are in breach of legislation should proceed through the constitutional threshold but not all will enjoy the defining weight of public policy, so as to justify the granting of a remedy. It is unclear what set of facts must be present for future cases involving illegal workers, to enjoy the “defining weight of public policy” and thus be entitled to remedies.

One can conclude that the two judgements discussed herein have marked a milestone in our law but that they have far from cleared the path for future illegal workers who seek access to the rights contained in the LRA, as the extent to which they have access to these rights remains somewhat hazy and would appear to depend on the facts of each case.

In light of the above it would thus be appropriate to conclude that labour rights have now been partially extended to illegal workers.
**BIBLIOGRAPHY**

**BOOKS**


Du Toit, D; Bosch, D; Woolfrey, D; Godfrey, S; Cooper, C; Giles, GS; Bosch, C and Rossouw, J *Labour Relations Law: A Comprehensive Guide* 5th ed (2006) Durban: LexisNexis Butterworths


Van der Merwe, S; Van Huyssteen, LF; Reinecke, MFB and Lubbe, GF *Contract General Principles* 2nd ed (2003) Landsdowne: Juta Law

**JOURNALS, ARTICLES AND PAPERS**


Bosch, C “Can Unauthorized Workers Be Regarded as Employees for the Purposes of the Labour Relations Act?” (2006) *ILJ* 1355

Bosch, C and Christie, S “Are sex workers ‘employees’?” (2007) *ILJ* 808


Norton, D “Workers In The Shadows: An International Comparison On The Law Of Dismissal Of Illegal Migrant Workers” (2010) *ILJ* 1521


TABLE OF CASES

*Board of Executors Ltd v McCafferty.* (1997) 1 *ILJ* 949 (LAC)

*Boumat v Vaughan* (1992) 13 *ILJ* 934 (LAC)

*CMS Support Services (Pty) Ltd v Briggs* (1998) 19 *ILJ* 271 (LAC)

*Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412

*Denel v Gerber* (2005) 26 *ILJ* 1256 (LAC)

*Discovery Health Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 *ILJ* 1480 (LC)

*Dube v Classique Panelbeaters* [1997] 7 BLLR 868 (IC)

*Equity Aviation Services (Pty) Ltd v CCMA & others* [2008] 12 BLLR 1129 (CC)

*Georgieva-Deyanova v Craighall Spar* (2004) 9 BALR 1143 (CCMA)


*Jajbhay v Cassim* 1939 AD 537

*Khosa v Minister of Social Development* 2004 (6) SA 505 (CC)

*“Kylie” and Van Zyl t/a Brigittes* (2007) 28 *ILJ* 470 (CCMA)

*“Kylie” v Commission for Conciliation, Mediation & Arbitration & Others* (2008) 29 *ILJ* 1918 (LC)

Liberty Life Association of Africa Ltd v Niselow (1996) 17 ILJ 673 (LAC)

Moloka v Greater Johannesburg Metropolitan Council (2005) 26 ILJ 1978 (LC)

Moses v Safika Holdings (Pty) Ltd [2001] 22 ILJ 1261 (CCMA)

Mthethwa v Vorna Valley Spar (1996) 7 (11) SALLR 83 (CCMA)

National Education Health & Allied Workers Union v University of Cape Town & Others (2003) 24 ILJ 95 (CC)

NAPTOSA v Minister of Education, Western Cape & Others (2001) 22 ILJ 889 (C)

NEWU v CCMA and Others (2003) 24 ILJ 2335 (LC)

Ntlabezo & Others v MEC for Education, Eastern Cape & Others [2002] 3 BLLR 274 (Tk)

NUCCAWU v Transnet Ltd t/a Portnet (2000) 21 ILJ 2288 (LC)

NUMSA & Others v Bader Bop (Pty) Ltd & another (2003) 24 ILJ 305 CC

Ongevallekommissaris v Onderlinge Versekeringsgenootskap AVBOB 1976 (4) SA 446 (A) at 455A-C.

Pearson v Sheerbonnet South Africa (Pty) Ltd (1999) 20 ILJ 1580 (LC)

Richards v Guardian Assurance Co 1907 TH 24

Rumbles v Kwa Bat Marketing (Pty) Ltd (2003) 24 ILJ 1587 (LC)

S v Jordan 2002 (6) SA 642 (CC)

S v Makwanyane 1995 (3) SA 391 (CC)
Schierhout v Minister of Justice 1926 AD 99

Sibande v CCMA & Others (2010) 31 ILJ 441 (LC)

Simela & Others v MEC for Education, Province of the Eastern Cape & Another [2001] 9 BLLR 1085 (LC)


South African National Defence Union v Minister Of Defence & Another (1999) 20 ILJ 2265 (CC)

State Information Technology Agency (Pty) Ltd v CCMA (2008) 29 ILJ 2234 (LAC)

United National Breweries (SA) Ltd v Khanyeza & Others (2006) 27 ILJ 150 (LAC)

Vundla v Millies Fashions (2003) 24 ILJ 462 (CCMA)

White v Pan Palladium SA (Pty) Ltd (2006) 27 ILJ 2721 (LC)
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<tr>
<td>Labour Relations Amendment Act 12 of 2002</td>
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<tr>
<td>Occupational Health and Safety Act.85 of 1993</td>
<td></td>
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<tr>
<td>Sexual Offences Act 23 of 1957</td>
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<tr>
<td>Western Cape By-Laws PN 710 of 24 November 1950</td>
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</tbody>
</table>
INTERNATIONAL CONVENTIONS

Abolition of Forced Labour Convention 105 of 1997

Discrimination (Employment and Occupation) Convention 111 of 1958

Equal Remuneration Convention 100 of 1951

Forced Labour Convention 29 of 1930

Freedom of Association and Protection of the Right to Organize Convention 87 of 1948

ILO Convention 158 of 1982

ILO’s Recommendation 198 of 2006

Minimum Age Convention 138 of 1973

Right to Organize and Collective Bargaining Convention 98 of 1949

Worst Forms of Child Labour Convention 182 of 1999